TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 990

THE UNITED STATES, PETITIONER

vs.

NUNNALLY INVESTMENT COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 25, 1941
CERTIORARI GRANTED DECEMBER 22, 1941

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1

In Court of Claims of the United States

No. 42389

NUNNALLY INVESTMENT COMPANY

v.

THE UNITED STATES

I. Petition

Filed March 18, 1933

To the Honorable Judges of the Court of Claims of the United States:

The Petitioner, the Nunnally Investment Company, a corporation, respectfully shows to this Honorable Court and alleges:

1

At all times hereinafter mentioned the Petitioner was, and still is, a domestic corporation organized and existing under the laws of the State of Georgia, with its principal office and place of business at 86 Edgewood Avenue, Atlanta, Georgia.

2

This petition is filed to recover from the United States the sum of $200,000.00, with legal interest thereon, being the amount of income and excess profits taxes paid by Petitioner for the year 1920 in excess of the amount the Petitioner alleges was legally due, and which sum was wrongfully collected by the
2 Commissioner of Internal Revenue for the said year and paid by the Petitioner involuntarily and under duress and protest.

3

The Petitioner filed its income and excess profits tax return under the Revenue Act of 1918, 40 Stat. 1057, for the year 1920 and showed thereon no tax liability.

4

Thereafter, the Commissioner of Internal Revenue reviewed the Petitioner's return for 1920 and determined an alleged deficiency in the Petitioner's income and excess profits taxes for said year in the sum of $493,817.95. The computation upon which said determination was based was set forth in a state-

ment attached to a 60-day letter dated June 26, 1926, copy of which letter and statement are attached hereto, marked "Exhibit A."

5

Pursuant to the determination of the alleged tax liability set forth in the 60-day letter, referred to in the preceding paragraph, the Commissioner of Internal Revenue thereafter, to wit, on or about August —, 1926, assessed against the Petitioner income and profits taxes for the year 1920 in the sum of $493,817.95 and interest thereon in the sum of $16,113.34, making a total amount of $509,931.29, which was demanded of Petitioner by the Collector of Internal Revenue for the District of Georgia on September 17, 1926.

6

The full amount of taxes and interest demanded of Petitioner, as described in the preceding paragraph, in the sum of $509,931.29, was collected from Petitioner by a cash payment of $509,931.29, made to said Collector on September 21, 1926, and by a credit of $14.37 allowed by the Commissioner on account of the overpayment of income taxes determined by the Commissioner to have been made against Petitioner for 1921.

7

In September 1929, the Commissioner of Internal Revenue refunded to Petitioner the sum of $250,000.00 out of, or with respect to, the payment of income and excess profits taxes and interest thereon for the year 1920, as described in paragraph 6 above.

8

Of the total payment of $509,931.29 made on September 21, 1926, as described in paragraph 6 above, the sum of $16,113.34, or 3.1599% of the total amount, represented interest on the income and excess profits taxes collected. Of the sum of $250,000.00 refunded to Petitioner in September 1929, as described in paragraph 7, the sum of $7,899.75, or 3.1599% of said refund, represented interest which had been collected on the income and profits taxes refunded, and the balance of $242,100.25 represented the refunded income and excess profits taxes for the year 1920.

9

The refund made in September 1929, as described in par-
4 agraphs 7 and 8 above, was based upon an adjustment of

the basis originally adopted by the Commissioner of Internal Revenue for the determination of an alleged gain on the sale of Petitioner's entire business and assets on January 2, 1920. The basis for the determination of the refund of income and profits taxes, described in paragraphs 7 and 8 above, is set forth in the schedule attached hereto marked "Exhibit B."

10

The unrefunded portion of the income and excess profits taxes collected from Petitioner, as described in paragraph 6 above, was excessive, illegal, and wrongfully collected by reason of the facts set forth in the following paragraphs.

11

On January 2, 1920, Petitioner sold its entire business and assets to The Nunnally Company of Delaware under a contract whereby the Purchaser paid $3,000,000.00 in cash and agreed to assume and pay all liabilities of Petitioner. Pursuant to this contract The Nunnally Company of Delaware paid additional income and excess profits taxes assessed against the Petitioner for the years 1917, 1918, and 1919. Among the tax payments so made by the Nunnally Company of Delaware on behalf of this Petitioner, $4,280.52 was paid on August 26, 1922, as additional income and excess profits taxes for the year 1919, and $35,458.98 was paid on May 16, 1921, as additional income and excess profits taxes for the years 1917 and 1918. The amounts of said taxes were in bona fide dispute until after the close of 1920; and as a practical matter it was impossible to determine, or even to estimate, the amount of these liabilities until after the end of 1920. The Commissioner of Internal Revenue has included these amounts in Petitioner's taxable income for the year 1920.

12

During the year 1920 Petitioner kept its books and reported its income on a cash receipts and disbursements basis and any taxes paid for Petitioner by the Purchaser under the contract of sale dated January 2, 1920, in the years 1921 and 1922, did not represent income to Petitioner in the year 1920. The Commissioner of Internal Revenue therefore has overstated Petitioner's income for the year 1920 in the sum of $39,739.50, by reason of including in said income the tax payments of $4,280.52 and $35,458.98, described in paragraph 11.

13

The Commissioner of Internal Revenue has understated Petitioner's invested capital before adjusting for inadmissibles for 1920 in the sum of $73,155.41 representing the prorated income and excess profits taxes of Petitioner for 1919 in the sum of $173,600.87, which tax was paid by The Nunnally Company of Delaware in 1920 and 1922 under a complete assumption agreement made by The Nunnally Company of Delaware with Petitioner on January 2, 1920, and therefore said tax was not paid out of Petitioner's surplus of January 1, 1920, and is not a proper deduction therefrom.

14

The Commissioner of Internal Revenue has understated
6 Petitioner's invested capital before adjustment for inadmissibles for 1920 in the sum of $35,458.98, representing income and profits taxes of Petitioner for the years 1917 and 1918, which were paid by The Nunnally Company of Delaware in 1921 under its complete assumption agreement of January 2, 1920. These taxes were never paid by Petitioner but by The Nunnally Company of Delaware, and were therefore never charged against Petitioner's surplus and do not constitute a proper deduction therefrom.

15

The facts hereinafter stated, and which were fully set forth in the claim for refund referred to in paragraph 26 below, and of which the Commissioner has proof in his files, so clearly bring Petitioner for the year 1920 within the provisions of Section 327 (a) and Section 327 (d) of the Revenue Act of 1918 and so clearly entitle Petitioner to have its profits taxes for the year 1920 computed by comparison with representative concerns, as provided in Section 328 of the Revenue Act of 1918, that the Commissioner had no discretion to refuse special assessment or to refuse to compute Petitioner's profits taxes for 1920 upon a comparison with fairly representative corporations and his failure to do so constitutes an utterly unwarranted and malicious and capricious abuse of the powers vested in him.

16

Prior to 1920 and since 1893, Petitioner had been engaged in the business of the manufacture and sale at wholesale and retail of confectionery. From 1885 to 1893 the same business had been conducted by an individual who was Petitioner's

predecessor in business. During the years from 1885 to 1919, inclusive, there had been built up for Petitioner a large goodwill in the manufacture and sale of confectionery, which goodwill was disposed of on January 2, 1920, for more than $2,000,000.00 in cash.

17

No part of the intangible values above referred to was included in Petitioner's invested capital for 1920, and no part of the expenditures for the building up of said goodwill was ever capitalized by Petitioner, and Petitioner's capital accounts included no goodwill or other intangible values.

18

At the end of 1919 and at the beginning of 1920 there was actually employed in the Petitioner's business goodwill and intangible values of approximately $2,000,000.00, which were not reflected in invested capital and these intangible values not reflected in invested capital were more than twice the tangible values reflected in invested capital, said tangible values reflected in invested capital amounting to less than $1,000,000.00, and said goodwill and intangible values were the principal income producing factor in Petitioner's business for 1920.

19

On January 2, 1920, Petitioner disposed of the goodwill and the intangible values in its business for more than $2,000,000.00 and realized a profit on same of approximately $1,100,000.00, being the excess over the March 1, 1913 value of same. This
8 $1,100,000.00 constituted substantially the entire income of Petitioner for 1920 and said profit on the sale of said goodwill and intangibles exceeded by approximately $500,000.00 the entire taxable net income of Petitioner for the year 1920, certain substantial losses having been realized after said sale on January 2, 1920.

20

The excess profits tax as finally determined by the Commissioner and as set forth in the computation attached hereto as "Exhibit B," works upon Petitioner an exceptional hardship evidenced by gross disproportion between the tax computed without the benefit of special assessment and the tax computed by reference to representative corporations engaged in a like or similar trade or business as specified in Section 328 of the Revenue

Act of 1918. Said hardship results from said abnormal conditions, affecting Petitioner's capital and income for the year 1920, as above set forth.

21

Upon the computation of Petitioner's income and tax liability for 1920, as finally determined by the Commissioner and as set forth in Exhibit B attached hereto, Petitioner has paid excess profits taxes for the year 1920 equivalent to 35.95% of its net income, and Petitioner has paid total income and profits taxes for 1920 equivalent to 42.3% of its net income, and the proportions of tax to income will be substantially as high after corrections in said income and taxes are made in accordance with the adjustments shown below on account of certain adjustments in income which are required by the facts set forth in paragraphs 24 and 25 below.

22

9 Petitioner expended in advertising for 1909 to 1919, inclusive over $1,750,000.00 to which was due in large part the building up of the large goodwill disposed of by Petitioner in 1920, as above stated, for approximately $2,000,000.00 cash. All of said advertising expenditures were charged to expense and no part of said expenditures or the goodwill resulting therefrom was capitalized by Petitioner and it is now and was in 1920 impossible to determine what portion of said expenditures should properly have been capitalized, and for that reason it is and has at all times been impossible for the Commissioner of Internal Revenue to determine Petitioner's invested capital for 1920.

23

A comparison of the tax paid by Petitioner for 1920 in proportion to its income with the tax paid by representative corporations engaged in a similar trade or business in proportion to their income discloses that the Petitioner's ratio of profits tax to income was grossly higher than the ratio of representative corporations engaged in a similar trade or business as defined in Section 328.

24

On January 2, 1920, Petitioner sold its entire business and assets of The Nunnally Company of Delaware under a contract whereby the Purchaser paid $3,000,000.00 in cash and agreed to assume and pay all liabilities of Petitioner. Pursuant to this contract, The Nunnally Company of Delaware paid additional

10 income and excess profits taxes assessed against Petitioner for the years 1917, 1918 and 1919. Among the tax payments so made by The Nunnally Company of Delaware on behalf of Petitioner, $4,280.52 was paid on August 26, 1922, as additional income and excess profits taxes for the year 1919, and $35,458.98 was paid on May 16, 1921, as additional income and excess profits taxes for the years 1917 and 1918. The amounts of said taxes were in bona fide dispute until after the close of 1920 and as a practical matter it was impossible to determine or even to estimate the amount of these liabilities until after the end of 1920. These amounts have been included in taxable income for 1920 as finally adjusted by the Commissioner and as set forth in Exhibit B attached hereto.

25

During the year 1920 Petitioner kept its books and reported its income on a cash receipts and disbursements basis and any taxes paid for Petitioner by the purchaser under the contract of sale dated January 2, 1920, in the years 1921 and 1922 did not represent income to Petitioner in the year 1920. The Commissioner of Internal Revenue therefore has overstated Petitioner's income for the year 1920 in the sum of $39,739.50, by reason of including in said income the tax payments of $4,280.52 and $35,458.98, described in paragraph 24.

26

On September 12, 1930, Petitioner filed with the Collector of Internal Revenue at Atlanta, Georgia, a claim for refund setting forth the facts and reasons upon which this suit is based. Said claim for refund was rejected by the Commissioner of Internal Revenue on March 20, 1931.

27

11 Petitioner is, and has always been since its incorporation in 1893, a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

28

Petitioner is the sole and absolute owner of the claim herewith presented, and has made no transfer or assignment of said

claim, or any part thereof, and Petitioner is justly entitled to the amounts claimed herein from the United States after allowing all just credits and set offs.

Wherefore, Petitioner prays for judgment in its favor and against the United States of America for the sum of $200,000.00, with interest thereon from September 21, 1926, as provided by law, together with the costs and disbursements of this action, and for such other relief as may to this Honorable Court seem just and proper.

THE NUNNALLY INVESTMENT COMPANY,
By WINSHIP NUNNALLY,
Vice President.

WM. A. SUTHERLAND,
Attorney for Petitioner,
First National Bank Bldg., Atlanta, Georgia.

Of Counsel:
ANDERSON, CRENSHAW & HANSELL.
SUTHERLAND & TUTTLE.
JOSEPH B. BRENNAN.

12 [*Duly sworn to by Winship Nunnally; Jurat omitted in printing.*]

13 *Exhibit A, to petition*

WASHINGTON, D. C., *June 26, 1926.*

IT:CA:PYA 3-17-60D.
NUNNALLY INVESTMENT COMPANY,
Atlanta, Georgia.

SIRS: The determination of your income tax liability for the years 1920 and 1921, in connection with an examination of your books of account and records and the decision of this Bureau, as set forth in office letter dated September 17th, 1924, has been changed to disclose a deficiency for 1920 of $493,817.95 and an overassessment for 1921 of $14.37, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment
14 must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:PYA:3-17-60D. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement.
Form A.
Form 882.

15 STATEMENT

IT:CA:PYA:3-17-60D.

IN RE NUNNALLY INVESTMENT COMPANY, ATLANTA, GEORGIA

Year 1920-1921; deficiency in tax $493,817.95; overassessment $14.37.

1920		
Net loss reported per books		$467,626.33
Add: Nontaxable income		56,386.82
Total		$524,013.15
Less:		
Interest on Securities Purchased	$8,646.06	
Profit on sale of assets	1,637,467.80	1,646,114.46
Net income adjusted		$1,122,101.31

Explanation of Adjustments

The nontaxable income and the interest on securities were fully explained in the Revenue Agent's report, dated May 7th, 1924. The profit on the sale of assets is as follows:

Consideration received		$3,209,958.91
Capital stock and surplus as of 12-31-19 adjusted in your brief	$1,072,491.11	
Goodwill allowed by Bureau	500,000.00	1,572,491.11
Profit adjusted		$1,637,467.80

16 **Invested Capital**

Invested capital reported in your brief		$1,072,491.11
Less:		
1919 tax prorated	$73,155.41	
1917-1918 Additional Tax	35,458.98	
Surplus adjusted	17,595.34	126,209.73
Balance		$946,281.38
Inadmissibles percentages .5561029		526,229.82
Invested capital		$420,051.56

Explanation

The adjustment for taxes is in accordance with Article 845 Regulation 45. The adjustment to surplus is fully explained in the Revenue Agent's report, dated May 7th, 1924.

Excess Profits Credit	$36,604.12
Excess Profits Tax Sec. 301	$424,717.64

Computation of Income Tax

Net Income	$1,122,101.31		
Less:			
Interest on U. S. Obligations not exempt	4,380.56		
Profits tax	424,717.64		
Exemption	2,000.00	$431,098.20	
Taxables at 10%		$691,003.11	
Amount of tax at 10%			$69,100.31
Total tax assessable			493,817.95
Previously assessed			none
Deficiency			$493,817.95

A goodwill valuation of $500,000.00 as of March 1, 1913, has been allowed in accordance with a recent decision of this Bureau.

17 1921

Net income per books		$178,104.35
Add: Interest on securities purchased		545.14
Total		$178,849.49
Less:		
Interest on securities purchased	$683.33	
Nontaxable interest	20,700.00	
Dividends received	103,519.50	124,902.83
Net income adjusted		$53,746.66

The above adjustment is fully explained in the Revenue Agent's report, dated May 7, 1924.

Computation of Tax

Net income	$53,746.66	
Amount of tax at 10%		5,374.67
Previously assessed		5,389.04
Overassessment		14.37

The overassessment shown herein will be made the subject of a certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district, and will be applied by that official in accordance with Section 284 of the Revenue Act of 1926.

Payment of the tax should not be made until a bill is received for the Collector of Internal Revenue for your District, and remittance should be then made to him.

18 *Exhibit B to petition*

Computation of Income and Tax as Revised by Adjustment in Gain From the Sale of Business

	Gross Income	
Interest:		
On Corporation Bonds	$21,768.67	
Foreign Government Bonds	5,500.00	
Victory 4¾% Bonds	4,380.56	
Bank Deposits	5,624.35	
Loans	23,040.89	$60,314.47
Profit on Sale of Business as Finally Adjusted	1,111,162.91	
Total Taxable Gross Income		$1,171,477.38

EXPENSES AND LOSSES

Expenses		$87,486.05	
Interest Paid		6,159.59	
Losses:			
On Bonds Sold	$12,951.27		
Nunnally Stock Sold	549,084.05	562,035.32	
Total Deductions			575,680.96
Final Adjusted Taxable Net Income			$595,796.42

ADD

Non-taxable Income:			
Interest Received	$16,992.22		
Less: Paid	8,646.66	8,345.56	
Dividends		39,394.60	47,740.16
Total Net Income			$643,536.58

19 The Invested Capital as determined by the Department is $420,051.56. See T. D. letter dated June 26, 1926, IT: 1CA: PYA: 3-17-60D (Exhibit "A"). This was determined as follows:

Capital Stock and Surplus at December 31, 1919		$1,072,491.11
Less:		
1919 tax prorated	$73,155.41	
1917-18 Additional tax	35,458.98	
Surplus adjusted	17,595.34	126,209.73
Balance		$946,281.38
Deduct: Inadmissibles percentage .5561029		526,229.82
Adjusted Invested Capital		$420,051.56

A computation of the tax upon the foregoing taxable net income and invested capital is set forth below:

Taxable Net Income	$595,796.42
Invested Capital	420,051.56
Excess Profits Credit	36,604.12

	Income	Credit	Balance	Rate	Tax
20% of I. C.	$84,010.31	$36,604.12	$47,406.19	20%	$9,481.24
Balance	511,786.11		511,786.11	40%	204,714.44
	$595,796.42	$36,604.12	$559,192.30	35.95%	$214,195.68

INCOME TAX

Net Income		$595,796.42	
Less:			
Interest on U. S. Obligations	$4,380.56		
Profits Tax	214,195.68		
Exemption	2,000.00	220,576.24	
Balance taxable at 10%		$375,220.18	
Tax at 10%			$37,522.02
Adjusted total tax not refunded			$251,717.70
Total tax refunded September —, 1929			242,100.25
Total tax paid on September 21, 1926			$493,817.95

21 II. *General traverse*

Filed April 25, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

W. W. SCOTT,
Acting Head,
Court of Claims Division.

III. *Argument and submission of case*

On November 12, 1940, argument of case on merits begun by Mr. Wm. A. Sutherland for plaintiff, and by Mr. J. W. Hussey for defendant.

On November 13, 1940, argument of case on merits was concluded and submitted on merits by Mr. Wm. A. Sutherland for plaintiff, and by Mr. J. W. Hussey for defendant.

23 IV. *Special findings of fact, conclusion of law and opinion of the court by Green, J., & Dissenting opinion by Whitaker, J.*

Filed January 6, 1941

Mr. Wm. A. Sutherland for the plaintiff. Crenshaw, Hansell & Gunby, and Sutherland, Tuttle & Brennan, were on the briefs.

Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Samuel O. Clark, Jr., for the defendant. Messrs. Robert N. Anderson and Fred K. Dyar were on the briefs.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

1. Plaintiff is, and since its reorganization in 1935 has been, a domestic corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business at Wilmington, Delaware, and is engaged in the investment business. Plaintiff is the successor of Nunnally Investment Company, a corporation which at all times material hereto and until its reorganization into the plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Georgia and having its office and principal place

of business in the City of Atlanta, Georgia. Prior to January 2, 1920, the Georgia corporation was engaged in the candy business and related businesses under the name of "The Nunnally Company," and after January 2, 1920, it was engaged in the investment business under the name of "Nunnally Investment Company."

The word "plaintiff" when used in the following findings refers to the Georgia corporation.

24 2. On January 2, 1920, plantiff sold all its business and assets to the Nunnally Company of Delaware for $3,000,000.00 cash and the assumption of certain of plaintiff's liabilities, including all Federal taxes chargeable against the assets or business of the plaintiff for the years 1917, 1918, and 1919. The total consideration paid under this contract in consideration of the transfer of the business and assets was $3,209,958.91, which was paid as follows:

Cash to plaintiff, 1920	$3,000,000.00
Income and excess profits taxes for 1919 to the Collector of Internal Revenue, 1920	169,320.35
Additional 1917 and 1918 income and excess profits taxes to the Collector of Internal Revenue, 1920	899.06
Additional 1917 and 1918 income and excess profits taxes to the Collector of Internal Revenue, May 16, 1921	35,458.98
Additional 1919 income and excess profits taxes to the Collector of Internal Revenue, August 26, 1922	4,280.52
Total consideration	3,209,958.91

3. Plaintiff filed its tentative income and excess profits tax return for the year 1920 on March 15, 1921, and showed no tax liability to be due. In Schedule 22A of its final return, filed shortly thereafter, which also showed no taxes due, the profit from the sale of its assets on January 2, 1920, was reported as follows:

Sale of net assets		$3,000,000.00
Add: Federal taxes for year 1919 paid by The Nunnally Company		169,320.35
Total sale price		3,169,320.35
Book Value of Net Assets:		
Capital Stock	$100,000.00	
Profit and Loss Surplus	1,015,174.27	
	1,115,174.27	
Fair Value of Capital Assets at March 1st, 1913, in excess of Book Value at that date after considering Depreciation to January 1st, 1920 (Per Schedule Attached)	157,225.00	1,272,399.27
Sales price of goodwill		1,896,921.08

25	Value of Goodwill at March 1st, 1913: The business was established in 1885, and at January 1st, 1920, had been conducted 35 years, of which 28 years were prior to March 1st, 1913. Therefore, the value of Goodwill at March 1st, 1913, is 28/35 or 4/5 of the Sales Price—4/5 of $1,896,921.08	$1,517,536.86
	Net profit from sale of assets	379,384.22

4. Thereafter the Commissioner of Internal Revenue reviewed the plaintiff's return for 1920 and determined a deficiency in plaintiff's income and excess-profits taxes for 1920 in the sum of $493,817.95. The computation upon which said determination was based was set forth in a 60-day letter dated June 26, 1926, which statement is printed as Exhibit A to the petition in this case, and made a part hereof by reference.

5. Pursuant to the determination of the tax liability set forth in the 60-day letter of June 26, 1926, the Commissioner of Internal Revenue in August of 1926 assessed against plaintiff, income and profits taxes for the year 1920 in the sum of $493,817.95 and interest thereon of $16,113.34, making a total amount of $509,931.29, which was demanded of plaintiff by the Collector of Internal Revenue for the District of Georgia on September 17, 1926, and was paid to the Collector on September 21, 1926.

6. On April 22, 1927, the plaintiff filed with the Collector of Internal Revenue at Atlanta, Georgia, a claim for refund of the full amount of taxes and interest paid as set forth in finding 5 above, alleging that the Commissioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold on January 2, 1920. No other ground for refund was stated in the claim.

7. More than six months having elapsed after the filing of said claim, the plaintiff filed a suit against the Collector of Internal Revenue in the United States District Court for the Northern District of Georgia, denying generally any of the taxes assessed against it by the Commissioner of Internal Revenue as
26 set forth in finding 5 above were due and raising no issue except the basis for tax purposes in the hands of the plaintiff of the assets sold on January 2, 1920.

8. The Collector filed an answer, denying the facts set forth as to the proper basis of the assets sold on January 2, 1920, or that the tax was illegal, but introducing no new issue by way of defense; and the case was tried on stipulations and oral testimony directed to the issue of the basis of the assets sold.

9. The jury rendered no general verdict and rendered the following special verdict:

"1. What was the fair market value on March 1, 1913, of the entire business and property of the Nunnally Company? One Million Six Hundred Thousand Dollars ($1,600,000).

"2. Did the leases then owned by them have a market value? Yes.

"3. If so, what was their aggregate value? ($11,000) Eleven Thousand Dollars."

10. Following the rendition of the verdict, the Collector filed a motion for a new trial based on the ground that the verdict was not supported by the evidence and was based upon some evidence which was alleged to have been improperly admitted.

11. The Court, following the rendition of the verdict, called on the parties for a computation of the judgment to be based on the verdict, and in pursuance of this order the Collector filed a computation employing the invested capital figures used in the 60-day letter of June 26, 1926, referred to and cited in finding 4, and employing the same income figures there used except that profit from the sale of assets was computed as follows:

Sale price of property sold 1/2/20		$3,209,958.91
Basis of property sold:		
Goodwill	$964,000.00	
Tangibles	1,072,491.11	
Leaseholds (depreciated in full)		
		2,036,491.11
Net Profit from sale		1,173,467.80

27 On the basis of this computation the Collector showed the following results:

Total tax		$280,377.95
Tax collected by defendant		493,817.95
Refund of tax		213,440.00
Refund of interest = $\frac{\$213,440.00}{\$493,817.95} \times \$16,113.34$		6,964.50
Overpayment of tax and interest		220,404.50

12. Plaintiff, prior to the filing of the Collector's computation referred to in the preceding finding, had filed a computation in which it had employed an adjusted invested capital figure of $452,655.57, instead of the figure of $420,051.56 employed in the 60-day letter of June 26, 1926, and in the Collector's computation referred to in the preceding finding, and in which it had shown the profit on the sale of assets as follows:

Sale price 1/2/20	$3,209,958.91
Basis of property sold	2,308,044.76
Net profit on sale	901,914.15

On the basis of these figures the plaintiff showed the following tax results:

Corrected tax	$153,820.03
Amount of tax paid	493,817.95
Overpayment of tax	339,997.92
Interest on overpayment	11,094.17
Overpayment of tax and interest	351,092.09

13. After having examined the Collectors computation, the plaintiff filed a computation, which was identical with the Collector's computation referred to in finding 11, as to invested capital and in all other respects except that the income arising from the sale on January 2, 1920, was computed on exactly the same basis set forth in the preceding finding, and the
28 plaintiff showed in this computation that the only difference between its final computation and the Collector's computation was as follows:

	Government	Nunnally
Goodwill 3/1/13	$964,000.00	$964,000.00
Tangibles 3/1/13	625,000.00	625,000.00
Increase in value of tangibles between 3/1/13 and 1/2/20	447,491.11	719,044.76
	2,036,491.11	2,308,044.76
Sale Price	3,209,958.91	3,209,958.91
Cost of property as of 1/2/20	2,036,491.11	2,308,044.76
	1,173,467.80	901,914.15
Difference in Profit	271,553.65	

On the basis of this computation the plaintiff showed the following tax results:

Corrected tax	$155,463.27
Amount of tax paid	493,817.95
Overpayment of tax	338,354.68
Interest on overpayment	11,040.55
Overpayment of tax and interest	349,395.23

14. In the light of the dispute between the parties, as to the proper valuation, on the basis of the verdict, of the assets sold on January 2, 1920, and in the light of the defendant's motion for a new trial, the parties on June 27, 1929, entered into the following stipulation for judgment and no appeal:

"Subject to the approval of the Attorney General of the United States, to be acted upon within thirty days from this date, it is hereby stipulated by and between the plaintiff, by its attorneys, Clifford L. Anderson, Granger Hansell, and H. Brand, and defendant, by C. P. Goree, Assistant U. S. Attorney, and

Elden MacFarland, Special Attorney, Bureau of Internal Revenue, that judgment be entered in the above-stated cause in favor of the plaintiff and against the defendant in the principal sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, together with interest on said sum from September 21, 1926, according to law, together with lawful costs of court.

"Said judgment having been entered, it is stipulated that neither side shall appeal therefrom.

29 "It is further stipulated that if the Attorney General does not take favorable action on this stipulation within the period of thirty days, as above set out, the stipulation shall be of no force and effect and the parties shall be restored to the same status which they occupied before the stipulation was entered into."

This stipulation for judgment represents the only agreement between the parties relating to the disposition of the suit. No actual computation of the tax and interest resulting in this exact figure of $250,000, for which judgment was entered, and no computation showing the division between tax and interest was made by either party at or before the conclusion of the District Court suit.

15. On the basis of said stipulation for judgment, judgment was entered on July 6, 1929, for $250,000 and lawful interest from September 21, 1926, and costs of suit, and a certificate of probable cause was granted.

16. In pursuance of said judgment, a certificate of overassessment was issued to the plaintiff for the $250,000 and interest thereon from September 21, 1926, to September 27, 1929, in the sum of $45,246.58 and costs of $18.75, and this total of $295,265.33 was paid to the plaintiff on or about September 29, 1929.

17. On September 13, 1930, the plaintiff filed with the Collector of Internal Revenue at Atlanta a claim for refund of $200,000 income and profits taxes for 1920. This claim used as the basis on January 2, 1920, of the property then sold the sum of $2,098,796, which figure the claim alleged, if used in conjunction with the other figures in the 60-day letter of June 26, 1926, which were undisputed in the District Court suit, would show the amount of refund for which judgment was rendered in the District Court. The claim was based upon the alleged right to special assessment and other grounds which have now been abandoned, and also upon the ground upon which this suit is now based, namely, that additional income and excess profits taxes paid in 1921 and 1922 by the purchaser, in accordance with the terms of the agreement covering the sale on January 2, 1920, did not constitute income

of the plaintiff in 1920 but only in the years in which the payments were made.

30 18. The claim for refund was rejected on Schedule dated March 20, 1931, and the present suit was filed on March 18, 1933. On May 9, 1939, the portions of the petition claiming special assessment and certain minor adjustments in invested capital, paragraphs 11 to 23, inclusive, were stricken, leaving involved in the suit only the claim that additional income and profits taxes paid by plaintiff's purchaser in 1921 and 1922 for the years 1917, 1918, and 1919 did not constitute taxable income of plaintiff for the year 1920.

19. The additional taxes for 1917 and 1918 in the amount of $35,458.98 and for 1919 in the amount of $4,280.52 were in dispute until after the year 1920 and the liability therefor was not determined until 1921 and 1922, the years in which these additional taxes were paid.

20. The records of the plaintiff were kept on a cash receipts and disbursements basis, and its returns, including that for 1920, were made on that basis.

21. All the underlying figures as to income and invested capital set forth in the 60-day letter of June 26, 1926, are correct with the exception of the figure $3,209,958.91 shown as the consideration received, and the figure of $1,572,491.11 shown as the basis at January 2, 1920, of the property then sold. The facts as to these excepted figures are set forth in Findings 22 and 23, infra.

22. The basis for tax purposes at January 2, 1920, of the property then sold was $2,098,796, and not $1,572,491.11 as shown in the 60-day letter of June 26, 1926.

23. The figure of $3,209,958.91 shown as the consideration received in 1920 from the sale of the assets sold on January 2, 1920, which figure was used in all the computations of the collector and the plaintiff in the proceeding in the United States District Court for the Northern District of Georgia, above referred to, is correct if the taxes of $39,739.50 paid in 1921 and 1922 for 1917, 1918, and 1919, as shown in Finding 19, are properly included in income for 1920. If such sums are not properly to be included in income for 1920, the figure of $3,209,958.91 is overstated by the amount of such improper inclusion.

31 *Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is entitled to recover.

Judgment will be withheld pending the filing, within ten days from the date of the rendition of this opinion, of a calculation of the amount of plaintiff's recovery on the part of the plaintiff, and a memorandum in relation thereto on the part of the defendant, in the manner stated in the opinion.

Opinion

GREEN, Judge, delivered the opinion of the court:

This is an action to recover the amount of $18,857.82 alleged to have been overpaid as income and profits taxes for the year 1920, together with interest thereon of $577.65.

On January 2, 1920, plaintiff sold all its business and assets. Part of the consideration of the sale was the assumption of certain taxes by the purchaser, which were paid in the years 1921 and 1922. The amount of these taxes was included by the Commissioner as part of plaintiff's income for the year 1920, and the Commissioner in August 1926, accordingly assessed against plaintiff income and profits taxes for the year 1920 in the sum of $493,817.95 and interest thereon of $16,113.34, making a total amount of $509,931.29, which was demanded of plaintiff by the U. S. Collector of Internal Revenue and paid to the collector September 21, 1926.

The plaintiff duly filed a refund claim for the whole amount of taxes and interest paid, alleging that the Commissioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold on January 2, 1920. No other ground for refund was stated in the claim. More than six months later the plaintiff filed suit against the Collector of Internal Revenue on the same grounds that were stated in the claim. The case was tried by a jury which rendered a special verdict and a stipulation was entered into between the parties that judgment should be entered in favor of the plaintiff for $250,000,
32 with interest and cost, which was accordingly done on July 6, 1929. Pursuant to this judgment a certificate of probable cause was granted and thereafter a certificate of overassessment was issued to the plaintiff in accordance with the judgment, and the total amount due thereon was paid to the plaintiff by defendant about September 29, 1929.

On September 13, 1930, the plaintiff filed with the Collector of Internal Revenue of Atlanta a claim for refund of $200,000. income and profits taxes for 1920. The claim was based on the alleged right to special assessment, and other grounds which have now been abandoned, and also upon the ground on which this suit is now based, namely, that additional income and excess-profits taxes paid in 1921 and 1922 by the purchaser in accord-

ance with the terms of the agreement of sale of January 2, 1920, did not constitute income of the plaintiff for 1920 but only in the years for which the payments were made. This claim for refund having been rejected suit was begun thereon on March 18, 1933. Thereafter certain portions of the petition were stricken leaving only the claim that additional income and profits taxes paid by plaintiff's purchaser in 1921 and 1922 did not constitute taxable income to plaintiff for the year 1920, the records and returns being kept on a cash receipts and disbursements basis.

Two questions are presented by the case. (1) Whether taxes for prior years assumed by the purchaser of plaintiff in 1920 were income to plaintiff in 1920, although the taxes were not actually paid in that year and (2) Whether plaintiff is precluded from recovery in this action of any refund of 1920 taxes by reason of the judgment obtained against the United States Collector of Internal Revenue for the District of Georgia.

We think it is clear that the fact that plaintiff was on a cash basis makes the 1921 and 1922 payments not income in 1920. See W. A. Hoult v. Commissioner, 23 B. T. A. 804; A. W. Henn v. Commissioner, 20 B. T. A. 1133; and Charles C. Ruprecht v. Commissioner, 16 B. T. A. 919.

The question of whether plaintiff's recovery is barred by reason of the judgment which it obtained against the defend-
33 ant in the suit against the collector presents a much more difficult problem. The plaintiff insists that an unbroken line of decisions by the Supreme Court lay down the rule that a judgment against a collector for taxes illegally collected is personal, and does not prevent the taxpayer from bringing a later suit against the United States involving errors alleged to exist in the computation of taxes for the same years. Sage v. United States, 250 U. S. 33, is cited as the leading case promulgating this doctrine. In this case, like the one at bar, the taxpayer had sued the collector on the ground that the taxes had been illegally collected, and recovered judgment which was paid by the United States. A suit was later begun for a residue of the same taxes. In defense it was pleaded that the suit was barred by a former judgment. The court referred to the fact that it was the duty of the District Attorney to appear for the collector in such suits under the statutes; that the judgment is to be paid by the United States, and the collector is exempted from execution if a certificate is granted by the court that there was probable cause for his act. The court further said:

"* * * But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it

would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in Minnesota v. Hitchcock, 185 U. S. 373, 388. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself. United States v. Frerichs, 124 U. S. 315. But perhaps it would be enough to say that if the judgment otherwise were a bar the bar would be removed by the subsequent enactment of the Act of July 27, 1912, c. 256, 37 Stat. 240, upon which, as well as the Act of 1902, this claim is based."

Counsel for the defendant call attention to the last sentence of the part of the opinion quoted above, and argue that it shows that the case was in fact decided upon a different ground from that which was first stated, and that all that is contained in the opinion with reference to the bar of a former judgment is merely dictum.

The principal contention of the defendant is, however, that the Sage case, supra, has been overruled by the opinion in the case of Moore Ice Cream Co. v. Rose, 289 U. S. 373, 381, 382, 383, in which the Supreme Court, with reference to a suit against a collector, said:

"His duty being imperative, he is protected by the command of his superior from liability for trespass * * *, and is entitled as of right, to a certificate converting the suit against him into one against the Government."

And also that—

"A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay.

* * * * * *

"In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court."

The court further said with reference to the collector:

"Execution can never issue against him upon any judgment recovered in favor of the taxpayer."

But in Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 312, decided during the same term, but at a prior date, it was held that a judgment against a collector was not res judicata against the Commissioner or the United States, citing Graham & Foster v. Goodcell, 282 U. S. 409, 430, and Sage v. United States, 250 U. S. 33.

35 So also in Tait v. Western Maryland Railway Co., 289 U. S. 620, 627, the Supreme Court said:

"In a suit for unlawful exaction the liability of a collector is not official but personal." Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham & Foster v. Goodcell, 282 U. S. 409, 430. "And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States." Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 311.

And in the case of Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 402, 403, the court said:

"A judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them. Cromwell v. County of Sac, 94 U. S. 351. There is a privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the Government. See Tait v. Western Maryland Railway Co., 289 U. S. 620. * * * Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (Sage v. United States, 250 U. S. 33; Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308) are not in point, since the suit against the collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.'" Sage v. United States, supra, p. 37.

The defendant contends that although the parties in the case at bar are not the same as those in the suit against the collector, the United States is privy to the case against the collector under the rules laid down in the Moore Ice Cream Co. case, supra, and that even if the doctrine of res judicata does not in a strict sense apply the plaintiff is nonetheless estopped by its judgment obtained against the collector. In support of this contention counsel for defendant cites the case of United States v. California Bridge & Construction Co., 245 U. S. 337, 341, in which the court said:

"The doctrine of estoppel by judgment, or res judicata, as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or
36 with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue, which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in personam in a former suit. * * *"

This same rule is applied by the Court of Civil Appeals of Texas in the case of Cauble v. Cauble, 2 S. W. (2d) 967, which notes a distinction between res judicata and estoppel by judgment.

In further support of this contention defendant quotes from Paul's Selected Studies in Federal Taxation (2d Ed.), pp. 124, 126, in which in commenting on the Western Maryland Railway Co. case and Bankers Pocahontas Coal Co. case the view is set forth that the real party in interest in these suits against a collector is always the United States, and that the decision of Justice Holmes in the Sage case, supra, that a suit against a collector is purely personal in nature must be considered as having been rendered inapplicable by the decision in the Moore Ice Cream Co. case.

The defendant further calls attention to an article in 46 Yale Law Journal, 1320 (1937), in which the author says (pp. 1342, 1343), in substance, that in the Moore Ice Cream Co. case the Supreme Court specifically held that where the collector acted pursuant to an assessment, the United States becomes a party to the judgment as a matter of law, and further that the decision in the Sage case should no longer be followed.

Attention is also called to that part of the opinion in the Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, which holds that identity of the parties is not a matter of form but of substance and that "a judgment is res judicata in a second action upon the same claim between the same parties or those in privity with them."

It might further be said that there can also be found in the decisions of the State courts many cases which hold that a litigant should be allowed but one opportunity to try his case on the merits in the interests of the public, and that on grounds of public policy, the principle of estoppel should be expanded so as to embrace within the estoppel of a judgment persons
37 who are not, strictly speaking, either parties to the suit.

Also it would seem that as the collector under the decision in the Moore Ice Cream Co. case was the duly authorized agent of the Government the question would arise whether the

judgment in a case against him would be binding against the United States and render the matter of litigation res judicata.

All the matters presented for our consideration by the defendant would have much force and perhaps be sufficient to warrant a decision in its favor if it were not for the positive decisions of the Supreme Court to the contrary. We cannot treat the language used by Justice Holmes in the Sage case, supra, as merely dictum when there are three recent cases which cite the case as an authority that a judgment against a collector is not res judicata against the Commissioner or the United States. For the same reason we think that it cannot be held that the Moore Ice Cream Co. case overrules the Sage case or the Bankers Pocahontas Coal Co. case, neither of which are mentioned in the first named decision.

As we have already shown the Supreme Court in the Tait case, supra, decided three weeks subsequent to the decision in the Moore Ice Cream Co. case again confirms the rule laid down in the Bankers Pocahontas Coal Co. case, and finally in the very recent decision of the Sunshine Anthracite Coal Co. case, supra, refers to the decision in the Sage case and the Bankers Pocahontas Coal Co. case as recognized authorities.

Without discussing the legal principles involved in the case now before us, we are of the opinion that the repeated holdings of the Supreme Court sustaining the Sage case and ignoring the Moore Ice Cream Co. case make it proper in the instant case to apply the doctrine of stare decisis and feel constrained to hold plaintiff's action is not barred by the judgment against the collector. This conclusion makes it unnecessary to consider the other questions raised in the case.

The findings show that plaintiff's purchaser agreed to pay taxes for 1917, 1918, and 1919 due from the plaintiff in the sum of $39,739.50. Although this amount was not paid until 1921
38 and 1922, it was erroneously included in the gross income of plaintiff for 1920 and plaintiff's taxes computed accordingly. The plaintiff is entitled to recover the amount its taxes for 1920 were increased by this error, together with interest as provided by law. But neither party has submitted a calculation of the amount of plaintiff's recovery, if entitled to judgment. The defendant presents a claim that plaintiff's recovery cannot be properly calculated as a reason for not entering judgment in its favor. With this we do not agree. On the contrary we think it can be done. Each party is granted ten days in which to file a typewritten statement, which on the part of the plaintiff shall contain a calculation of the amount due in accordance with this judgment, and on the part of the defendant a memorandum con-

taining such further observations as its counsel may see fit to present with reference to the amount of plaintiff's recovery, and the papers so filed will be considered by the court in entering judgment.

LITTLETON, Judge; and WHALEY, Chief Justice, concur.

Dissenting opinion

WHITAKER, Judge, dissenting:

It is axiomatic that a former judgment is res judicata in a second suit on the same cause of action, not only as to those who were parties to the former action, but also as to their privies. The cause of action in the present suit is the same as in the former one and the plaintiff is the same; but in the former one the Collector of Internal Revenue of the United States was the defendant, whereas in this suit it is the United States that is the defendant, and not its collector. The question presented, therefore, is whether or not under the circumstances of this case the United States in the former action was a privy of its collector.

Section 12 of the Act of March 3, 1863 (12 Stat. 737, 741) provides that in suits against collectors to recover taxes "no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury" in these two cases, (1) where the court shall have certified "that there was probable cause for the act done by the collector
39 or other officer" or (2) where "he acted under the directions of the Secretary of the Treasury or other proper officer of the government."

In this case it appears from our findings of fact that in collecting the tax from this plaintiff the collector acted in pursuance of the second condition, that is, under an assessment made by the Commissioner of Internal Revenue. Under such circumstances the judge had no discretion as to whether or not the necessary certificate should be issued. The collector was entitled to it as of right. Had the collector acted on his own motion, without an assessment or other direction from his superiors, the certificate would have issued or not according to whether or not the judge believed that he had acted with probable cause; but not so where the collector acted in pursuance of instructions. Here the judge had no discretion. Upon it appearing that the collector acted under instructions, he was compelled to issue the certificate. Therefore, in this case, under the statute, no execution could possibly issue against the collector; but, of necessity, the judgment had to "be provided for and paid out of the proper appropriation from the treasury."

Under such circumstances, the United States knew when suit was brought against the collector that it would have to respond to any judgment rendered. When the suit was instituted it was, therefore, put on guard to defend its interest. This it in fact did in the former proceeding in this case. Its United States Attorney appeared and defended the action; he defended, not to save the collector from an execution, but to save the United States from responsibility for the judgment.

In that suit the United States had an opportunity to interpose every defense it could have, interposed had the suit been against it in name, instead of against it in substance; and the plaintiff had the right to advance every ground for recovery that it could have advanced had the United States been the nominal defendant. Every reason for the rule of res judicata is, therefore, present in this case. The reason a former judgment binds not only the same parties, but also their privies, is that a person in privity with a party to the action is under the obligation, because of his interest in the outcome of the litigation, to see to it that all defenses are raised in that suit to defeat it. He is under this obligation because the burden of the judgment may fall on him, in whole or in part. Therefore, having once had the opportunity to defend, he is denied it if later a suit is brought against him in person.

I have no doubt that the former judgment in this case is res judicata. My only concern is whether or not this view is in harmony with prior decisions of the Supreme Court. I think it is, if those decisions can be properly limited to cases where the United States might not have to pay the judgment and liability therefor might fall on the collector personally. I think they can be.

In the following discussion of the cases in the Supreme Court it is necessary to keep in mind that there are two contingencies under which a judgment against a collector must be satisfied by the United States; one is in a case where the judge shall issue a certificate that "there was probable cause for the act done by the collector or other officer"; and the other is "that he acted under the directions of the Secretary of the Treasury or other proper officer of the government." My view is that former decisions of the Supreme Court holding that a judgment against the collector is not res judicata in a later suit against the United States should be limited to cases where the judge must exercise his discretion as to whether or not to issue a certificate of probable cause, and do not apply to a case where the collector acted under directions of his superior, in which case the certificate must issue of necessity.

The leading case is Sage v. United States, 250 U. S. 33. In this case the court held that a judgment against the collector was not res judicata in a later proceeding against the United States.

This was on the theory that the suit against the collector was a personal one, for a wrong committed by him personally in exacting taxes which the taxpayer did not owe. Since it was a personal action, for which he might have to respond personally without the right of idemnification by the United States, the court held that a judgment against him was not res judicata in a later suit against the United States, which might not
41 have been involved by the former judgment. But it did not appear in that case whether or not the collector in collecting the taxes had acted on his own motion or under directions of the Secretary of the Treasury. Apparently the decision was grounded upon the fact that the certificate might or might not have been granted within the discretion of the trial judge, and that, therefore, until such a certificate should issue, the United States did not know whether or not it would become liable for the judgment. Since it could not know this until after the judgment was rendered, the court held it was a stranger to the judgment at the time it was rendered, and for this reason the judgment would not bind it in a later action. At the bottom of page 37 the court said:

"At the time judgment is entered the United States is a stranger. Subsequently the *discretionary* action of officials may, *or it may not*, give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself." [Italics supplied.]

So far as appears, the court's attention was not directed to the difference between a case for the issuance of a certificate of probable cause and a case where the collector was performing merely a ministerial duty in collecting an assessment made by his superiors, in which case a certificate must issue as a matter of course. In the former the United States might or might not become liable for the judgment; in the latter it could not but be.

In the case of Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, which followed the decision in the Sage case, supra, it did not appear whether or not the collector had acted in pursuance of an assessment or on his own motion, nor is there anything in this case, also, to indicate that the court's attention had been directed to the distinction between a suit against a collector acting under directions from his superior officers and one in which he had acted on his own motion. It was merely stated without discussion that a judgment against a collector was not "res judicata against the Commissioner or the United States."

42 The first case in which this distinction seems to have come to the attention of the court is Moore Ice Cream Company, Inc., v. Rose, Collector of Internal Revenue, 289 U. S. 373. In view of what was held in that case it seems to me that

had this distinction come to the attention of the court in the Sage case and in the Bankers Pocahontas Coal Company case, these decisions would have been limited to instances where the collector had acted without instructions from his superior.

This distinction between the relation of the United States to a suit against the collector where he had acted under directions of his superior officer, and its relation to one where he had acted on his own motion was carefully developed by the court in this case. It did not deal with the question of whether or not a judgment against a collector would be res judicata in a later suit against the United States, but it seems to me that it necessarily follows from its decision that it would be in a case where he had acted under directions of his superior.

The Moore case involved the necessity for protest as a prerequisite to a suit to recover taxes erroneously exacted. The argument in support of the necessity for protest was that while the statute might eliminate the necessity for it in a suit against the government, it could not constitutionally do so in a suit against the collector, as to taxes paid prior to the passage of the Act, since the collector was under a personal obligation to pay any judgment recovered against him. The court, discussing this personal liability, and after calling attention to the fact that there were two different conditions upon which the government agreed to indemnify the collector, proceeded to discuss at length the difference between the relation of the collector and of the United States in a suit in which the collector had acted under the directions of the Secretary of the Treasury or other proper officer of the government, and in a suit where he had acted on his own motion. Dealing with a case where he had acted under instructions, the court said:

> There was nothing left to his discretion. Other duties less definitely prescribed may leave a margin for judgment and
> 43 for individual initiative. Cf. Agnes v. Haymes, 141 Fed. 631. There was no such margin here. His duty being imperative, *he is protected by the command of his superior from liability for trespass* [citing cases], and is entitled *as of right to a certificate converting the suit against him into one against the Government.* * * * The case is not one for a certificate of probable cause, as it might be if the officer had trespassed under a mistaken sense of duty. In such circumstances a certain latitude of judgment may be accorded to the certifying judge, though even then it is enough that a seizure has been made upon grounds of reasonable suspicion. [Citing cases.] One does not speak of probable cause when justification is complete. Here the certifying judge will be subject to a specific duty upon the facts admit-

ted by the demurrer to relieve the Collector of personal liability and to shift the burden to the Treasury.

* * * * * *

"A suit against a Collector who has collected a tax in the fulfilment of *a ministerial duty* is today an anomalous relic of bygone modes of thought. *He is not suable as a trespasser, nor is he to pay out of his own purse.* He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. Philadelphia v. Collector [5 Wall. 731]. There may have been utility in such procedural devices in days when the Government was not suable as freely as now. [Citing cases.] They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court." [Italics supplied.]

Since in such a case the collector was not personally liable for trespass (the basis for the decision of the court in the Sage and Bankers Coal Company cases) and could not be subjected to personal liability in any event, the court held that to deprive him of the necessity for protest against the exaction of a tax, paid prior to the enactment of the statute, did not deny him due process.

But the court was careful to limit its opinion to a case where the collector was acting under the directions of his superior officer, and expressly differentiated such a case from one where the issuance of a certificate by the court was "dependent upon controverted facts, or upon facts permitting different inferences or calling upon the judge to exercise discretion." This was for the reason that in the latter case the United States might never become liable for the judgment, whereas in the former its liability was definite and certain.

In view of this decision, I think the decision in the Sage case and in the Bankers Pocahontas Coal Company case must be limited to instances where the collector has not acted under directions of his superior. Where he has so acted, he has committed no personal trespass and can in no event be made to pay the judgment rendered; the liability therefor always falls upon the United States. The liability under the judgment being inescapable, responsibility is on the United States to offer all of its defenses in that suit. Having thus had its day in court, it cannot later bring a suit on the same cause of action. Conversely, the plaintiff, having once had the opportunity to present its claim

in full against the United States, although the collector was the nominal defendant, it cannot do so again in a later action. It may be otherwise where the collector has acted on his own motion and not under instructions, but not in a case where the liability for the judgment must of necessity fall on the United States.

I do not think the decision in Tait v. Western Maryland Ry. Co., 289 U. S. 620, is contrary to this view. On the contrary, it is some support for it. There the court said:

"If a suit for unlawful exaction the liability of a collector is not official but personal. Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham & Foster v. Goodcell, 282 U. S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 311. We think, however, that where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner, the collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment." See Second National Bank of Saginaw v. Woodworth, 54 F. (2d) 672; Bertelsen v. White, 58 F. (2d) 792.

45 While, the court stated, a judgment in a personal action against the collector is not res judicata in a later suit against the Commissioner or the United States, still, it said, a former judgment against the United States or the Commissioner would estop the collector in a later suit, because of the privity between him and the United States and its Commissioner. If this be true, how can it be doubted that a judgment against the collector for an act done by him at the direction of the Commissioner would be an estoppel against the Commissioner or the United States in a later suit? And a judgment cannot be an estoppel against one party to a suit and not against the other. Where the collector acts under the Commissioner's direction, and not on his own motion, his act is the act of the Commissioner, and a judgment against him for this act must of necessity bind the Commissioner. Under this decision, it would be otherwise if he acted on his own motion. I know of no other theory on which the quoted statements from this case can be harmonized.

There is nothing in the decision in Sunshine Coal Co. v. Atkins, 310 U. S. 381, which is contrary to this view. This case merely states again, incidentally, the proposition laid down in the Sage case, that the suit against the collector is personal, and for this reason a judgment in such a suit is not a bar to a subsequent suit against the United States. I think this expression,

as the similar expression in the Sage case, must be limited to those cases where the collector might be personally liable for the payment of the judgment.

For the reasons stated, I think plaintiff's petition should be dismissed.

47 V. *Order of court entering judgment*

Jan. 27, 1941

Now on this 27th day of January 1941, the court, having considered the memorandums of the respective parties with reference to the amount of judgment to be entered herein, finds that the plaintiff is entitled to a refund of $18,280.17 taxes paid and $596.48 interest paid on September 21, 1926.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the total sum of eighteen thousand eight hundred seventy-six dollars and sixty-five cents ($18,876.65) heretofore paid, with interest at the rate of six percent per annum from September 21, 1926, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the Revenue Act of 1928.

By the Court,

RICHARD S. WHALEY,
Chief Justice.

49 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 45339. Court of Claims. Term No. 990. The United States, Petitioner vs. Nunnally Investment Company. Petition for a writ of certiorari and exhibit thereto. Filed April 25, 1941. Term No. 990 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE 194

Supreme Court of the United States

No. 990, October Term, 1940

Order granting petition for rehearing and certiorari

December 22, 1941

On petition for writ of certiorari to the Court of Claims.

A petition for rehearing having been filed in this case on the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1942

No. 990

In the Supreme Court of the United States

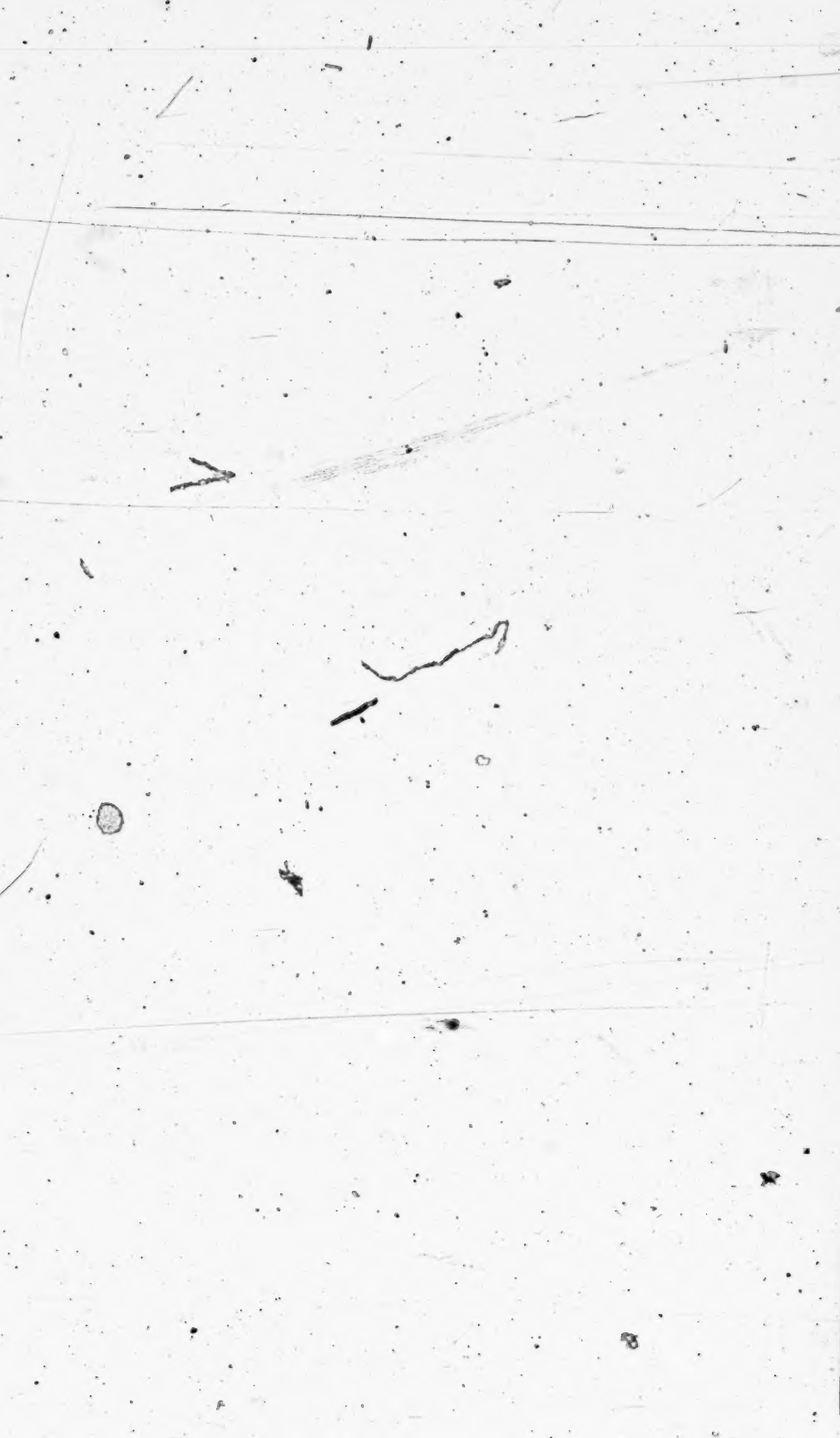
OCTOBER TERM, 1940

THE UNITED STATES, PETITIONER

v.

NUNNALLY INVESTMENT COMPANY

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 990

THE UNITED STATES, PETITIONER

v.

NUNNALLY INVESTMENT COMPANY

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Comes now the petitioner, United States of America, by the Solicitor General, and respectfully prays for a reconsideration by the Court of its order of May 26, 1941, denying certiorari herein.

This case raises the question whether a taxpayer who has already obtained a refund of income taxes in a United States District Court in a suit against the Collector of Internal Revenue may thereafter bring another suit in the Court of Claims to obtain an additional refund of income taxes for the same year.

The question presented is closely related to the issue in *United States* v. *Kales*, No. 35, 1941 Term,

certiorari granted, April 28, 1941. In the *Kales* case, the Government is contesting the right of the taxpayer to maintain a suit for refund of income taxes against the United States, where she had previously obtained a refund for the same year in a suit against the Collector. And in that case, the Government takes the position, *inter alia*, that the overpayment of income taxes for any one year constitutes a single cause of action which cannot be split and litigated piecemeal in various suits. If the Government should prevail upon that ground in the *Kales* case, a different result would be required in the present case. Since the two cases are closely related, they should be heard together.

It is therefore respectfully submitted that the order denying the petition for certiorari be vacated and that the petition be granted.

FRANCIS BIDDLE,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

FRANCIS BIDDLE,
Solicitor General.

JUNE 1941.

U. S. GOVERNMENT PRINTING OFFICE : 1941

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OPINION BELOW

The opinion of the court below (R. 20–32) is reported in 36 F. Supp. 332.

JURISDICTION

The judgment of the Court of Claims was entered January 27, 1941 (R. 32). The petition for a writ of certiorari was filed April 25, 1941 (R. 32), and was denied on May 26, 1941. Upon petition for rehearing, the order denying certiorari was vacated and the petition granted on December 22, 1941. The jurisdiction of this Court is conferred by Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

In 1929 the taxpayer obtained a judgment in the District Court against the Collector of Internal Revenue, awarding it a refund of income taxes for the year 1920. May it thereafter bring another suit in the Court of Claims to obtain an additional refund of income taxes for the same year which it had paid to the same Collector?

STATUTES INVOLVED

Revised Statutes.

> SEC. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.
>
> (U. S. C., Title 28, Sec. 842.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 1128.
>
> * * * * * *
>
> (b) Section 3210 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3210. (a) Except as provided in subdivision (b) the gross amount of all taxes and revenues received under the provisions of this Act, and collections of whatever nature received or collected by authority of any internal-revenue law, shall be paid daily into the Treasury of the United States under instructions of the Secretary of the Treasury as internal-revenue collections, by the officer receiving or collecting the same, without any abatement or deduction on account of salary, compensation, fees, costs, charges, expenses, or claims of any description. A certificate of such payment, stating the name of the depositor and the specific account on which the deposit was made, signed by the treasurer, assistant treasurer, designated depositary, or proper officer of a deposit bank, shall be transmitted to the Commissioner of Internal Revenue.

* * * * *

(U. S. C., Title 26, Sec. 3971.)

STATEMENT

The special findings of fact of the Court of Claims (R. 13–19) may be summarized as follows:

The respondent is a Delaware corporation, the successor, since 1935, of a Georgia corporation of the same name. The Georgia corporation, formerly the Nunnally Company, is hereinafter referred to as the taxpayer (R. 13–14).

On January 2, 1920, the taxpayer sold all its business and assets to the Nunnally Company of Dela-

ware for $3,000,000 cash and the assumption of certain of the taxpayer's liabilities, including Federal taxes for the years 1917, 1918, and 1919. These taxes amounted to $209,958.91, of which $170,219.41 was paid by the purchaser in the year 1920, and the remainder of $39,739.50 was paid in 1921 and 1922 (R. 14).

Taxpayer filed an income tax return for the year 1920, reporting a net profit of $379,384.22 from the sale of its assets, but showing no tax liability as a result of certain offsetting items (R. 14–15). Thereafter the Commissioner of Internal Revenue determined a deficiency for the year 1920 in the amount of $493,817.95. In determining the deficiency the Commissioner employed a lower basis in computing gain upon sale of the taxpayer's assets, and he used $3,209,958.91 as the sales price, representing the cash consideration of $3,000,000 plus $209,985.91 of the taxpayer's tax liability for earlier years which the vendee discharged. The profit on sale was thus computed to be $1,637.467.80 (R. 8–11, 15).

The additional tax assessed, together with interest of $16,113.34 making a total amount of $509,931.29, was demanded of the taxpayer by the Collector of Internal Revenue for the District of Georgia, and was paid to the Collector on September 21, 1926 (R. 15).

On April 22, 1927, the taxpayer filed with the Collector a claim for refund for the full amount

of taxes and interest paid alleging that the Commissioner's statement of income was erroneous by reason of his understatement of the basis of the assets sold. No other ground for refund was stated in the claim. More than six months after the filing of the claim, the taxpayer filed suit against the Collector in the United States District Court for the Northern District of Georgia, denying that any of the taxes assessed against it were due and raising no issue except the basis for determining profit of the assets sold on January 2, 1920 (R. 15).

The case was tried on stipulations and oral testimony directed to the issue of the basis of the assets sold. The jury rendered a special verdict determining the value as of March 1, 1913, of the entire business and property of the Nunnally Company and of certain leases. Thereafter the Collector filed a motion for a new trial (R. 15–16).

Upon order of the court, the parties submitted computations of the amount of the judgment to be based on the verdict, the taxpayer submitting two computations and the Collector one. In all of these computations the sales price used was the same, i. e., $3,209,958.91, but there was a divergence in other figures making a considerable difference in the computations of the amount of the overpayment of tax and interest (R. 16–17).

In the light of the dispute between the parties as to the proper use of the figures and of the de-

fendant's [the Collector's] motion for a new trial, the parties on June 27, 1929, entered into the following stipulation for judgment and no appeal (R. 17–18):

> Subject to the approval of the Attorney General of the United States, to be acted upon within thirty days from this date, it is hereby stipulated by and between the plaintiff, by its attorneys, Clifford L. Anderson, Granger Hansell, and H. Brand, and defendant, by C. P. Goree, Assistant U. S. Attorney, and Elden MacFarland, Special Attorney, Bureau of Internal Revenue, that judgment be entered in the above-stated cause in favor of the plaintiff and against the defendant in the principal sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, together with interest on said sum from September 21, 1926, according to law, together with lawful costs of court.
>
> Said judgment having been entered, it is stipulated that neither side shall appeal therefrom.
>
> It is further stipulated that if the Attorney General does not take favorable action on this stipulation within the period of thirty days, as above set out, the stipulation shall be of no force and effect and the parties shall be restored to the same status which they occupied before the stipulation was entered into.

On the basis of this stipulation for judgment, judgment was entered on July 6, 1929, for $250,000

and interest and costs of suit, and a certificate of probable cause was granted. Thereafter a certificate of overassessment was issued to the taxpayer and the total amount of $295,265.33 shown thereon was paid to it on or about September 29, 1929 (R. 18).

Thereafter, on September 13, 1930, the taxpayer filed a claim for refund of $200,000 income and profits taxes for 1920. It sought refund on the ground, *inter alia,* that the sales price of the assets should not have been as high as $3,209,958.91, because some of the taxpayer's pre-1920 taxes which the vendee paid and which were included in that purchase price, were in fact not paid until 1921 and 1922 and therefore could be income to the taxpayer only in the latter years rather than in 1920. The claim also sought refund on other grounds that were later abandoned[1] (R. 18–19).

Upon rejection of this claim, suit was instituted in the Court of Claims on March 18, 1933.

The Court of Claims gave judgment for the taxpayer holding that the taxes assumed by the purchaser, but not paid until after 1920, did not constitute taxable income to the respondent in 1920; and that the judgment against the Collector in the District Court was not *res judicata* in this suit against the United States (R. 20). Judge Whitaker dissented (R. 26).

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[1] These other grounds accounted for most of the $200,000 claimed. The ground remaining in the case involved only $18,280.17 in taxes, plus interest (R. 32).

SPECIFICATION OF ERROR TO BE URGED

The Court of Claims erred in permitting a suit against the United States to recover taxes for the year 1920, notwithstanding the prior judgment in the suit against the Collector of Internal Revenue with respect to the same tax for the same year.

SUMMARY OF ARGUMENT

The earlier suit against the collector precludes the maintenance of this suit. The taxes involved relate to the year 1920 and were paid in a lump sum to a single collector. Whatever rights the taxpayer may have had to a refund of those taxes constituted but a single cause of action, and it could have raised every issue with respect to the validity of those taxes in the earlier suit.

Congress has established elaborate machinery for administrative and judicial review of Federal income tax controversies. The aggrieved taxpayer is given an alternative of three courses of action: (a) he may contest the taxes in the Board of Tax Appeals; (b) he may pay the taxes and sue the United States for refund; or (c) he may pay the taxes and sue the collector for refund. But whichever course he elects, he is simply litigating a single cause of action and should not be permitted to relitigate the liability for the same year's taxes in another forum.

Although the collector suit is historically derived from a common law proceeding in assumpsit, and although it retains some of the "personal" char-

acteristics of its common law precursor, it is nevertheless a *statutory* remedy today. And since it is one of three statutory remedies, it is no answer to say that its "personal" attributes render it a cumulative rather than an alternative remedy. The rule against splitting a single cause of action is well established, and it should not be assumed, in the absence of clear legislative language, that Congress intended a departure from that rule here.

Our position is not contrary to the recent decision in *United States* v. *Kales* (No. 35, this Term, decided December 8, 1941) which involved taxes paid to two different collectors and therefore two causes of action rather than one. It is also not inconsistent with *Sage* v. *United States*, 250 U. S. 33, for reasons set forth at length in the Argument.

ARGUMENT

THE MAINTENANCE OF THIS SUIT IS FORECLOSED BY THE PRIOR SUIT FOR THE SAME TAX YEAR IN WHICH THE TAXPAYER COULD HAVE SOUGHT REFUND FOR THE AMOUNT INVOLVED HEREIN

Introductory.—This case involves taxes for the year 1920. The returns originally filed on March 15, 1921, disclosed no tax liability. Thereafter, in 1926, the Commissioner determined a deficiency of $493,817.95 which was assessed and paid together with interest to the Collector of Internal Revenue. The deficiency was based upon a recomputation of the taxpayer's profit from the disposition of its business, which it had sold in 1920 for $3,000,000 in

cash plus the purchaser's assumption of certain of the taxpayer's outstanding liabilities, including federal taxes for the years 1917, 1918, and 1919. Those early taxes amounted to $209,958.91, of which $170,219.41 was paid by the purchaser in 1920, and the remaining $39,739.50 in 1921 and 1922. Thus, the total consideration received upon the sale of the taxpayer's business was $3,209,958.91.

In determining the taxpayer's deficiency for 1920, the Commissioner made a downward revision of the basis of the assets sold and used $3,209,958.91 as the sales price.

After paying the deficiency, the taxpayer filed a claim for refund, in which it alleged as its sole ground that the Commissioner had understated the basis of the assets. It then brought suit against the collector for refund of *the full amount* of the deficiency. The jury did not render any general verdict but it made certain findings of fact in the form of a special verdict. There then arose a dispute between the parties as to the computation of the refund allowable based upon the jury's findings, and that dispute was settled by a compromise in which the taxpayer agreed to accept a refund of $250,000 plus interest. It was further stipulated that neither side would appeal.

On the basis of that agreement, judgment was entered on July 6, 1929, which was satisfied on September 29, 1929 by the payment of $250,000, plus $45,246.58 interest, plus $18.75 costs (R. 18).

On September 13, 1930, the taxpayer filed another claim for refund upon a variety of grounds in which it sought an additional refund for the same year. It has since abandoned all except one of those grounds (R. 18), namely, that the purchaser's payment of the vendor's 1917–1919 taxes could not be included in the sales price for 1920 to the extent that the purchaser paid those early taxes in 1921 and 1922, i. e., to the extent of $39,739.50, and that the profit on sale must be reduced accordingly.[2]

Thus, although the taxpayer has already prevailed in a suit against the collector on the ground that its profit on sale was erroneously computed, it now seeks an additional refund in a suit against the United States based upon a recomputation of the profit on the identical sale. Plainly, the taxpayer could have presented the entire controversy in the prior case, and could have asked for a redetermination of the sales price as well as the basis of the assets;[3] and, indeed, it did ask for a refund of the *full amount* of the taxes it had paid (R. 15).

[2] The taxpayer has not disputed that the $39,739.50 was taxable income. Its sole contention has been that it could not be taxed in 1920. Presumably, it would be taxable in 1921 and 1922 unless liability were barred by the statute of limitations.

[3] Of course, it probably would have had to amend its claim for refund so as to raise the issue squarely in that case, but the statute of limitations had not run when it commenced the prior suit, and it was entirely free to amend its claim at that time.

It is our position that normally the tax liability for any year constitutes but a single cause of action, and that a taxpayer may not litigate that liability in more than one suit. At the very outset, before setting forth our position in full, it is important to distinguish *United States* v. *Kales*, No. 35, this Term, decided December 8, 1941. The *Kales* case involved the unusual situation in which taxes had been paid to *two* different collectors. The taxpayer thus had two separate causes of action, one against each collector; and in her suit against one of the collectors she had recovered all the taxes that she had paid to him. In that suit she could not have recovered any of the taxes that she paid to the other collector. She then brought a second suit in which she sought refund of the remaining taxes. Thus, this Court treated the case as though there were two separate causes of action, and held that recovery on one cause of action did not preclude suit upon the second. Here, on the other hand, all the taxes involved were paid to a single collector, and every question with respect to their validity could have been raised in the taxpayer's prior suit. We contend that Congress in providing for three different methods of contesting taxes (i. e., suits against the United States, suits against the collector, and proceedings before the Board of Tax Appeals) intended those methods to be alternative, and did not contemplate that a taxpayer who was unsuccessful or only partly successful in

one forum should then be able to relitigate the same cause of action on the same or different theories in a different forum.

1. The principle that a single cause of action may not be split is of long standing. In *Stark* v. *Starr*, 94 U. S. 477, this Court pointed out that a litigant (p. 485):

> is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. * * *

See also *Grubb* v. *Public Utilities Comm.*, 281 U. S. 470; *United States* v. *California and Ore. Land Co.*, 192 U. S. 355; *Werlein* v. *New Orleans*, 177 U. S. 390; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Nolan* v. *City of Owensboro*, 75 F. (2d) 375 (C. C. A. 6th); *Fields* v. *Philadelphia Rapid Transit Co.*, 273 Pa. 282; *See* v. *See*, 294 Mo. 495. In accord with that principle it has been often held that a judgment in a former suit for refund is a bar to a subsequent suit for refund of taxes for the same year notwithstanding the fact that the ground for recovery urged in the second suit had not been presented in the first. *Chicago Junction Rys. etc.* v. *United States*, 10 F. Supp. 156 (C. Cls.); *Bowe-Burke Mining Co.* v. *Willcuts*, 45 F. (2d) 394 (Minn.); *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.). See also *Bertelsen* v. *White*, 58 F. (2d) 792 (Mass.), affirmed on other

grounds, 65 F. (2d) 719 (C. C. A. 1st), and *American Woolen Co.* v. *United States,* 18 F. Supp. 783 (C. Cls.), affirmed on rehearings, 21 F. Supp. 125, 1021, certiorari denied, 304 U. S. 581.

Thus in *Guettel* v. *United States,* 95 F. (2d) 229 (C. C. A. 8th), certiorari denied, 305 U. S. 603, an estate tax case, the court said that taxpayers (p. 231):

> were not at liberty to split up their claim for the recovery of their overpayment of the estate tax, and to prosecute it piecemeal or to present in their first suit only a portion of the grounds upon which they based their claim that the tax had been overpaid, and leave another ground or other grounds to be presented in a subsequent action.

Similarly, in *Western Maryland Ry. Co.* v. *United States,* 23 F. Supp. 554 (Md.), the court went even further, holding that a former suit against the collector for refund of taxes barred a second suit against the United States for interest. The court said (p. 556):

> a tax and resulting interest are to be treated as constituting a single liability and thus as one cause of action, and not merely an aggregation of separate items of indebtedness. * * *
>
> * * * * * *
>
> It is fundamental that a single cause of action may not be split up and brought piecemeal, because, otherwise, litigation might be rendered interminable. See *Stark* v. *Starr,*

> 94 U. S. 477, 24 L. Ed. 276; *Baltimore Steamship Company* v. *Phillips,* 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069; Freeman on Judgments, 5th Ed. § 596. This doctrine is equally applicable to tax cases. *Guettel* v. *United States,* 8 Cir., 95 F. (2d) 229; *International Curtis Marine Turbine Co.* v. *United States,* Ct. Cl., 56 F. (2d) 708. * * *

And it has been held in other circumstances that the claim that the income tax for a single year has been overpaid constitutes but one cause of action. *International Curtis Marine Turbine Co.* v. *United States,* 56 F. (2d) 708 (C. Cls.); *American Woolen Co.* v. *United States,* 18 F. Supp. 783 (C. Cls.), *supra.*

The foregoing principles are fully applicable to collector suits. To require the taxpayer to litigate its liability in a single suit works no hardship. The taxpayer had a right to a jury trial and could have raised every possible issue relating to its liability for the year in question. And in a suit for refund even against a collector, there is drawn into question every item which entered into the computation of the tax. *Lewis* v. *Reynolds,* 284 U. S. 281. The taxpayer should not be permitted to split a single cause of action and litigate the parts in separate proceedings.

2. Moreover, the statutory scheme for administrative and judicial review of tax controversies makes it highly unlikely that Congress intended to

permit a multiplicity of suits on the same cause of action. The dissatisfied taxpayer may take any one of three courses of action: (a) he may seek review of the Commissioner's determination in the Board of Tax Appeals and thereafter in the appellate courts; (b) he may pay the contested tax and sue the United States for refund either in the Court of Claims or in the District Court (subject to certain jurisdictional restriction in the latter); or (c) he may sue the Collector for refund in the District Court. If the taxpayer goes to the Board of Tax Appeals, he is thereafter precluded by Section 284 (d) of the Revenue Act of 1926 from bringing suit for the recovery of any part of such tax in any court with certain exceptions. This statute is merely in recognition of the rule generally followed that a single cause of action may not be the subject of more than one suit. If the taxpayer elects course of action (b) or (c) instead of seeking relief in the Board of Tax Appeals, he should not thereafter be allowed to elect another course. Having once made his election, he should be bound thereby.

If respondent's position were correct, then the Government would have the right, conversely, to sue a taxpayer in the name of the United States notwithstanding that a prior suit between the collector and the taxpayer had already settled the taxpayer's liability for the year in question. The Government has never assumed that it had any such

right, and it would indeed be a surprise to a taxpayer to learn that he might be harassed by the United States in a subsequent suit for the very taxes that had been adjudicated in a suit between himself and an officer of the Treasury Department who was represented in the litigation by the Attorney General.

3. That the collector suit, even though described as "personal," is now a statutory remedy cannot be open to serious question. At one time it was purely a common law proceeding in assumpsit. *Elliott* v. *Swartwout*, 10 Pet. 137. But when a statutory duty was imposed upon the collector to pay his collections into the Treasury, it was held that the common law action disappeared (cf. *Cary* v. *Curtis*, 3 How. 236), and the various statutory provisions which restored the right to sue the collector make it unmistakably plain that although Congress intended the collector suit to retain certain "personal" attributes (e. g., jury trials), it is nevertheless a *statutory* remedy.[4] *Schoenfeld* v. *Hendricks*, 152 U. S. 691, 693; *Nichols* v. *United States*, 7 Wall. 122, 126–127; *Barney, Collector* v. *Watson*, 92 U. S. 449, 452; *Arnson* v. *Murphy*, 109 U. S. 238, 240, 243; *Auffmordt* v. *Hedden*, 137 U. S. 310, 329; *City of Philadelphia* v. *The Collector*, 5 Wall. 720, 731–735; *Collector* v. *Hubbard*, 12 Wall.

[4] The history of the collector suit is traced in greater detail in our brief in *United States* v. *Kales*, No. 35, this Term, pp. 34–38.

1, 12–14; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383.

The present status of the suit against the collector was thus summarized by Mr. Justice Cardozo in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 382–383:

> A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. *He is made a defendant because the statute has said for many years that such a remedy shall exist*, though he has been guilty of no wrong, and though another is to pay. * * * There may have been utility in such procedural devices in days when the Government was not suable as freely as now. * * * They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics supplied.]

True, in some circumstances the suit against the collector may retain certain of its "personal" characteristics,[5] as Congress has intended that it

[5] See, e. g., *Patton* v. *Brady*, 184 U. S. 608, 612–615; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Lowe Bros Co.* v. *United States*, 304 U. S. 302.

should, but the plain fact remains that it is in reality a suit against the Government, that the Attorney General appears on behalf of the collector (against whom execution will not issue) with full authority, in the language of *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 403, "to represent its [the Government's] interests in a final adjudication of the issue in controversy." The mere fact that Congress intended the collector suit to retain certain procedural incidents, such as jury trials, does not mean that it intended the "personal" character of the remedy to be the basis for multiple litigation on the same cause of action. The collector suit is a statutory remedy, and such a departure from normal legal principles should not lightly be inferred in the absence of clear statutory language to that effect.

4. Our position is not opposed to *Sage* v. *United States,* 250 U. S. 33, which arose under materially different statutory provisions. The death taxes there involved had been collected under an 1898 statute, and a 1902 statute had thereafter directed refund of certain taxes theretofore collected. The claimant brought suit and recovered judgment against the collector in the amount then thought to be refundable. However, it appeared that judgment should have been in a greater amount, and Congress in 1912 enacted further legislation spelling out the extent of refund in such circumstances. The claimant thereafter brought suit against the

United States for the difference, relying primarily upon the newly enacted 1912 legislation. As the Court in the *Sage* case noted, 250 U. S. at 39, "The Act of 1912, like that of 1902, created rights where they had not existed before * * *." Accordingly, although the opinion dealt at length with the "personal" nature of the collector suit, the decision is supportable upon the ground that the rights which were the subject matter of the second suit had not been the subject of prior litigation. Indeed, the *Sage* case has been regarded at least several times as resting upon the particular legislation there involved. See *Second Nat. Bank of Saginaw* v. *Woodworth*, 54 F. (2d) 672, 673 (E. D. Mich.), affirmed, 66 F. (2d) 170 (C. C. A. 6th); *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250, 254 (N. D. Ill.), appeal dismissed, 102 F. (2d) 981 (C. C. A. 7th). See also Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L. J. 1320, 1341–1342.

Moreover, the *Sage* case can have no bearing upon our argument that Congress did not intend to permit multiple suits on the same cause of action in view of the comprehensive machinery that it has established for litigating tax matters. That issue was never raised in the *Sage* case (cf. *Webster* v. *Fall*, 266 U. S. 507, 511), and indeed could not have been fully presented at that time, for the Board of Tax Appeals had not yet come into existence.

The *Sage* case is further distinguishable upon the ground that whatever vital distinctions may then have existed between suits against the collector and suits against the United States have disappeared since that time. Thus, the Court stated (250 U. S. at 37), "The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different." At that time interest was allowable on judgments against the collector (cf. *Erskine* v. *Van Arsdale*, 15 Wall. 75), whereas Congress had made no provision for interest in suits against the United States. That difference obviously made it much more attractive to sue the collector than the United States, and probably is in large part responsible for the much larger proportion of suits against collectors at that time. But that discrepancy has since been eliminated by Section 177 of the Judicial Code, as amended by Section 1324 (b) of the Revenue Act of 1921 (42 Stat. 227), Section 1117 of the Revenue Act of 1926 (44 Stat. 9), Section 615 of the Revenue Act of 1928 (45 Stat. 791), and as finally amended by Section 808 of the Revenue Act of 1936 (49 Stat. 1648), so that the provisions for interest are identical irrespective of whether the defendant is the collector or the United States. As to what the Court in the *Sage* case meant by the difference in the "nature of the defenses open" it is difficult to determine. Although there may be certain procedural differences between the two

types of suits, there are, we believe, no differences of any substance.

At the time of the *Sage* decision (1919), it was essential to allege that the taxpayer had paid under protest, in order to support the action in assumpsit. But that requirement was subsequently eliminated by the Revenue Act of 1924, *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, and since that time the taxpayer's "cause of action" against the collector is in all essential respects a right against the United States. Accordingly, although it is true that Congress intended to retain the collector suit as one of the methods of litigating federal taxes, it nevertheless swept away the last remaining basis for the fiction that the "cause of action" against the collector is "personal." True, certain "personal" characteristics of a procedural nature remained, but the suit against the collector became in substance a suit against the Government. As the Court in the *Moore Ice Cream Co.* case observed (p. 379), the 1924 amendment "* * * did not draw a distinction between suits against the body politic and suits against a public officer who was to be paid out of the public purse. It put them in a single class, and made them subject to a common rule." In these circumstances, the *Sage* case is plainly no bar to the application of the usual principles of *res judicata* here. Cf. *Chicago, R. I., & P. Ry.* v. *Schendel,* 270 U. S. 611, 620; *Calhoun's Lessee* v.

Dunning, 4 Dall. 120, 121; *Cromwell* v. *County of Sac*, 94 U. S. 351, 360; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284, 285; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401–404; *Souffront* v. *Compagnie des Sucreries*, 217 U. S. 475. See *United States* v. *Candelaria*, 271 U. S. 432, 444.

5. Finally, for the further reasons set forth at length in Judge Whitaker's dissenting opinion (R. 26–32), the maintenance of this suit is forbidden by the doctrine of *res judicata*, and this result is not contrary to any decision of this Court. The contrary view of the majority is that the suit against the collector was "personal" and hence cannot bind the United States.[6]

The fallacy in applying that reasoning here is this. Section 989 of the Revised Statutes, *supra*, p. 2, provides that where recovery is had against a collector and the court certifies [1] "that there was probable cause for the act done by the collector * * * *or* [2] that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government," then no execution may issue against the collector and the judgment must be paid by the United States. The pivotal factor here is the fact that the two conditions quoted above are in the disjunctive. The

[6] Compare the language of this Court in the *Kales* opinion to the effect that "The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it." Advance sheets, p. 9.

collector is relieved of liability *either* where there is probable cause *or* where he has acted under the direction of a superior officer. Where the collector must rely only upon probable cause, then the suit against him may conceivably be regarded as "personal," and only upon the issuance of a certificate of probable cause does the United States become liable to pay the judgment. But where, as here, the taxes were collected in 1926 in pursuance of an assessment of the Commissioner of Internal Revenue, the collector does not have to rely upon "probable cause." He is protected *from the very outset* against execution on any judgment that may be rendered in the proceedings. The moment such a suit is brought against the collector, it is the United States and only the United States that ever can be liable on any judgment entered in favor of the taxpayer. And in such a suit the United States appears through its Attorney General, not to defend itself against any possible secondary liability, but rather against its own liability. In no circumstances could a "personal" judgment in any real sense be rendered against the collector where he has collected the tax pursuant to instructions from his superior officer.

As Judge Whitaker points out (R. 27–28), it was assumed in the *Sage* case that a certificate might or might not have been granted to the collector, and since the United States could not know whether a certificate would issue, it was a stranger to the

judgment at the time it was rendered. The Court said (250 U. S. at 37):

> At the time the judgment is entered the United States is a stranger. Subsequently the *discretionary* action of officials may, *or it may not,* give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself. [Italics supplied.]

Here, on the other hand, liability of the United States rests, not on a certificate of "probable cause," but rather on the fact that the collector acted under the directions of his superior. There never was a moment in which the liability of the United States was in doubt with respect to any judgment that might nominally be entered against the collector.[7]

We wish to make it plain that we are not asking the Court to make any departure from established

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[7] These considerations similarly appear not to have been examined in *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308. Moreover, that case did not involve the question whether the very liability litigated could thereafter be relitigated in another suit. It involved an extension of the doctrine of *res judicata*, namely, the effect of a decision of tax liability for one year upon a similar but nevertheless entirely separate liability for a later year. This is an entirely different question; a judgment with respect to an earlier tax year may not be binding as to a later year, although the liability for the early year itself could undoubtedly not be relitigated. Cf. *Blair* v. *Commissioner*, 300 U. S. 5.

principles. We recognize that the collector suit is "deeply imbedded in the statutes and judicial decisions of the United States." *United States* v. *Kales,* advance sheets, p. 9. But we do say that notwithstanding certain procedural characteristics, such as jury trials, that are attributable to its historical origin, the collector suit is nevertheless a statutory remedy today; and that since Congress has established a comprehensive system for litigating federal taxes, it is not to be presumed, in the absence of clear statutory language, that Congress intended to permit a single cause of action to be litigated in more than one suit. Although the collector suit is concededly a permissible mode of contesting federal taxes, it is nevertheless in fact a suit against the Government in the circumstances of this case, and a judgment in such a suit should not be subject to reconsideration in another suit against the United States.

CONCLUSION

The decision of the court below is erroneous and should be reversed.

Respectfully submitted.

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FEBRUARY 1942.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. 990.

THE UNITED STATES,

Petitioner,

v.

NUNNALLY INVESTMENT COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 990.

THE UNITED STATES,

PETITIONER,

v.

NUNNALLY INVESTMENT COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF IN OPPOSITION TO PETITION FOR REHEARING.

The petition for rehearing herein presents no new argument. The case of *United States v. Kales*, No. 35, 1941 Term, solely relied upon as a basis for rehearing, was cited and relied upon in the petition for certiorari (p. 14), and was no doubt considered by this Court in denying certiorari in the present case four weeks after certiorari was granted in the *Kales* case.

The *Kales* case is in no way similar to the present case. The main question there involved—and no doubt the only question considered by this Court in granting certiorari—relates to the sufficiency of the claim for refund. The question whether Mrs. Kales was foreclosed by a prior suit against a Collector of Internal Revenue—the only question which could be suggested as remotely related to the present case—was so little relied upon by the United States in the Circuit Court of Appeals that the point was not even mentioned in the Government's brief or in its petition for rehearing. It is therefore doubtful whether this Court would feel that the point is properly raised on certiorari, even if it were meritorious—which it clearly is not.

Whichever way the *Sage* case or the present case had been decided, it is clear that the recovery by Mrs. Kales from one Collector of the income taxes paid to that Collector could not conceivably bar her from maintaining a suit against a second Collector or the United States for the recovery of income taxes paid to that second Collector. The situation in the *Kales* case is entirely different from that presented in the *Sage* case and the present case, in that Mrs. Kales could not possibly have recovered, in the suit against the first Collector, any part of the sum paid to the second Collector.

With respect to the present case, the Respondent's brief in opposition contains a complete discussion of the reasons why certiorari should not be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1940.

No. 990.

THE UNITED STATES,

PETITIONER,

v.

NUNNALLY INVESTMENT COMPANY.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The opinion of the court below (R. 20-32) is reported in 36 F. Supp. 332.

QUESTION PRESENTED.

Where a taxpayer has recovered judgment against a Collector of Internal Revenue for an overpayment of income and profits taxes and later files claim and brings suit in the Court of Claims for a further refund of tax for the same year on a new ground, which is determined to be meritorious, is the Court precluded from rendering judgment against the United States by reason of the former suit and judgment against the collector?

STATEMENT.

The special findings of fact by the Court of Claims are summarized at some length in the brief for petitioner. Briefly stated, the material facts are these. Respondent had brought suit in a District Court against a Collector of Internal Revenue for an overpayment of income tax for 1920 on the sole ground that the cost basis for tax purposes of the assets sold in 1920 had been understated by the Commissioner. Respondent recovered a judgment in that suit, which was paid by the United States. But the cost basis established was not as high as that claimed, and for that reason only a portion of the taxes paid was recovered.

Thereafter, respondent filed a further claim for refund of 1920 taxes on a ground not previously raised, and on rejection of the claim brought suit against the United States in the Court of Claims.[1] That Court held the new claim meritorious and rendered judgment for the respondent, over the Government's contention that the previous suit and judgment against the collector was a bar to the proceeding against the United States.

The Government does not here question the lower court's holding on the merits. Nowhere in the petition or brief is there any denial that the Government had collected from respondent and is retaining taxes excessive in the amount of the judgment. The Government attacks the decision below solely on the technical ground that judgment against the United States was precluded by the previous judgment against the collector.

[1] In addition to the ground on which judgment was rendered by the Court of Claims, the claim for refund contained a number of other grounds, since abandoned.

SUMMARY OF ARGUMENT.

This case presents exactly the same question that was presented to this Court 23 years ago in the *Sage* case. In the *Sage* case the Government made exactly the same contention which it makes here, namely, that the taxpayer was precluded from bringing a tax refund suit against the United States by reason of having previously sued the collector, and advanced much the same arguments upon which it relies here. In the *Sage* case the Court unanimously rejected this contention, and its decision has repeatedly been followed and cited with approval by this Court during the past 23 years.

The Government attempts desperately but unsuccessfully to distinguish or to discredit the *Sage* decision. The *Sage* decision was not, as the Government here contends, based on the 1912 Statute referred to in the decision; it was not overruled by this Court in the *Moore Ice Cream Co.* case; it was not affected at all by the statutory provision creating the Board of Tax Appeals; nor was it affected in any way by the statutes enacted by Congress with respect to interest and protest in connection with tax refund suits; neither is there any merit in the Government's attempted distinction under the probable cause statute.

The Government is here simply making again the same arguments which it made in the *Sage* case; and the arguments are no better now than they were then, besides being now rejected by a line of unanimous decisions. The Government has repeatedly relied upon the *Sage* decision; and it does not attempt to show that any unfair or oppressive consequences have resulted from the decision. Unfairness would obviously result if this Court should overrule the decision and destroy the only existing remedies of persons such as respondent who have been entitled, in shaping their courses, to rely upon the unanimous decisions of this Court

in the *Sage* case and the cases following it. The doctrine of stare decisis applies with particular force in such a situation. If any changes need to be made in the law as to collector suits, such changes should be made by Congress, since Congress alone is in a position to act on the subject as a whole, to avoid the confusion which is almost certain to result from a piece-meal overruling of a line of established decisions of this Court, and to make the desired changes prospective only so as to avoid gross inequities.

ARGUMENT.

I. This Case Is Squarely Covered by the Decision in the *Sage* Case.

This case presents exactly the same question that was presented to this Court 23 years ago in *Sage v. United States*, 250 U. S. 33 (1919).

In the *Sage* case as in the present case the taxpayer first sued the collector and recovered a portion of the taxes paid, and then sued the United States in the Court of Claims to recover a further portion of such taxes. In the *Sage* case as in the present case the Government argued that the earlier suit against the collector barred the taxpayer from maintaining the later suit against the United States. In the *Sage* case the Court unanimously rejected the Government's argument and squarely held that suit against the collector does not bar a subsequent suit against the United States. The opinion was written by Mr. Justice Holmes.

The *Sage* decision has repeatedly been followed and cited with approval by this Court. See *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (1921); *Union Trust Co. v. Wardell*, 258 U. S. 537 (1922); *Graham v. Goodcell*, 282 U. S. 409 (1931); *Bankers Pocahontas Coal Co. v. Burnet*, 287 U. S. 308 (1932); *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620 (1933); *Lowe Bros. Co. v. United States*, 304 U. S. 302 (1938); *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 403 (1940); *United States v. Kales*, No. 35, decided December 8, 1941.

In *Bankers Pocahontas Coal Co. v. Burnet*, supra, the Court said, with respect to the contention that a previous suit against the collector was res judicata in the subsequent suit against the Commissioner, that (287 U. S. at p. 312):

> "With respect to this contention it is sufficient to

> say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not res judicata against the Commissioner or the United States. Graham v. Goodcell, 282 U. S. 409, 430; Sage v. United States, 250 U. S. 33; see Smietanka v. Indiana Steel Co., 257 U. S. 1; compare Union Trust Co. v. Wardell, 258 U. S. 537."

In *Tait v. Western Maryland Ry. Co.*, supra, the Court said (289 U. S. at p. 627):

> "In a suit for unlawful exaction the liability of a collector is not official but personal. Sage v. United States, 250 U. S. 33; Smietanka v. Indiana Steel Co., 257 U. S. 1; Graham v. Goodcell, 282 U. S. 409, 430. And for this reason a judgment in a suit to which he was a party does not conclude the Commissioner or the United States. Bankers Pocahontas Coal Co. v. Burnet, 287 U. S. 308, 311, ante, 325, 329."

It is clear therefore that the *Sage* case is squarely in point and requires a decision in favor of the taxpayer in the present case.

II. The Government's Attempt to Distinguish or Discredit the *Sage* Case Is Unsuccessful.

The Government attempts desperately but unsuccessfully to distinguish the *Sage* case from the present case or to discredit it.

First. The Government says the *Sage* decision was based on the 1912 Statute referred to in the decision. This argument is unsound. The brevity of the reference in the *Sage* opinion to the 1912 Statute, together with the fact that such reference is prefaced by the word "perhaps", shows clearly that the 1912 Statute was mentioned in the opinion only as a *possible* alternative basis for the decision, and that it was in no way intended to detract from the actual

holding in the case fully developed by Mr. Justice Holmes in the earlier part of the opinion that there was a difference in parties because the suit against the collector was personal and not a suit against the United States. The later decisions of this Court fully confirm this view. Thus, in the *Bankers Coal Co.* case, supra, the Court followed the *Sage* decision and held that the earlier suit against the collector was not res judicata in a later suit against the Commissioner or the United States, although there was clearly no 1912 Statute or anything like it in the *Bankers Coal Co.* case.[2]

In the *Smietanka* case, supra (opinion by Mr. Justice Holmes), decided just two years after the *Sage* case, the taxpayer in attempting to avoid the holding of the *Sage* case urged that the *Sage* decision did not turn upon the

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[2] The Government suggests (Br., p. 25, footnote 7) that the *Bankers Coal Co.* case can be distinguished because there the earlier suit was for a different tax year. A reading of the opinion in the *Bankers Coal Co.* case will show that the Court did not attribute any significance at all to this fact, but followed the *Sage* case and rested the decision squarely on the sole ground that the earlier suit against the collector was against a different party and therefore was not binding in the later suit against the Commissioner or the United States. Cf. *Tait v. Western Maryland Ry. Co.*, supra; and compare the Government's argument here with its argument in the *Bankers Coal Co.* case (No. 104; October Term 1932, Govt. Br., p. 20):

> "On the other hand, the suit in the District Court was against the Collector of Internal Revenue. In *Sage v. United States*, 250 U. S. 33, this Court held that the United States was not privy to a judgment against a collector of internal revenue, and that the judgment was not a bar in a suit brought against the United States in the Court of Claims involving a part of the same tax. In that case, this Court pointed out that the suit against the collector is personal and its incidents are different. We believe that the petitioners' argument that the Commissioner is privy to the suit against the collector is fully answered by what this Court said in the Sage case, supra, which the court below accepted as controlling upon this question. That case was cited with approval by this Court in *Graham & Foster v. Goodcell*, 282 U. S. 409, 430. See also *Smietanka v. Indiana Steel Co.*, 257 U. S. 1, 4, 5. Cf. *Union Trust Co. v. Wardell*, 258 U. S. 537."

lack of identity of parties in the two suits, but on the 1912 Statute referred to above. The Court there considered the argument so clearly without merit that it did not even refer to it in the opinion.

It is clear from the foregoing that the Government errs when it says the *Sage* case was based on the 1912 Statute.

Second. The Government urges that the *Sage* case was, in effect, overruled by *Moore Ice Cream Co. v. Rose*, 289 U. S. 373 (1933). The *Moore Ice Cream Co.* case did not involve any question of a second suit, such as was involved in the *Sage* case and in the present case. The only question there decided was the question of the constitutional right of Congress under the due process clause retroactively to abolish the requirement of protest at the time of paying the tax where the suit was against the collector. The *Sage* case was not mentioned in the *Moore Ice Cream Co.* decision. Exactly three weeks after the *Moore Ice Cream Co.* case was decided, the Court expressly approved of the *Sage* case, in *Tait v. Western Maryland Ry. Co.*, supra. See the quotation from the *Tait* case at page 6, supra. Also, it was at the same term of Court, only several months before the *Moore Ice Cream Co.* case was decided, that the Court followed and approved the *Sage* case in *Bankers Coal Co. v. Burnet*, supra. Also, the *Sage* case has since been cited with approval by this Court, for exactly the holding for which it is now cited by respondent, in the *Sunshine Coal Co.* case, supra (1940), and the *Kales* case, supra (1941). The foregoing facts show clearly that this Court had no intention whatsoever in the *Moore Ice Cream Co.* case of overruling the *Sage* case.

Third. The Government contends that the *Sage* case is distinguishable from the present case because of the fact that the Board of Tax Appeals has been created by Congress since the *Sage* decision was rendered. In the stat-

utes relating to the Board of Tax Appeals, the only thing that Congress has provided with respect to suits for refund is that no such suit can be maintained by a taxpayer in any court if the taxpayer has appealed to the Board.[3] This shows that Congress had no difficulty in expressing its intention to prohibit suits for refund where it wanted to prohibit such suits. If Congress had wanted to prohibit a refund suit against the United States where a previous suit had been brought against the collector, it would have so provided. It did not so provide and such provision cannot possibly be read by implication into the statutes creating the Board of Tax Appeals.

Fourth. The Government argues (Br., pp. 21-22) that the *Sage* case is no longer to be followed, because since the *Sage* case was decided, Congress has made interest collectible in suits against the United States just as in suits against collectors; and has removed the necessity of protest in suits against collectors and in suits against the United States. The statutes just referred to will be searched in vain for any language which even remotely suggests that Congress intended to alter the rule laid down by this Court in the *Sage* case. These amendments made by Congress as to interest and protest show that Congress has not hesitated to change the procedure with respect to tax refund suits where it considered such change was necessary or desirable. Congress has not considered it necessary or desirable to make any change in the rule laid down by this Court in the *Sage* case, although it is now almost 23 years since the *Sage* case was decided. The Government's argument therefore fails entirely in so far as it seeks to find support in the statutes enacted by Congress since the *Sage* decision was rendered.

Fifth. The final argument of the Government (Br., pp.

[3] Revenue Act of 1926, Section 284 (d), Act of Feb. 26, 1926, ch. 27, Sec. 284, 44 Stat. 9, 66.

23-25) is that the doctrine of the *Sage* case is not applicable where as here it is shown that the collector acted under the direction of the Commissioner. The argument seems to be that under Section 989 of the Revised Statutes a collector acting under the direction of his superior officer is certain that a certificate will be issued making the judgment against him payable out of the Treasury and that, therefore, the United States is a party to the suit and judgment contrary to the holding in the *Sage* case. The argument is clearly without merit. Whether the collector acted (1) with probable cause as in the *Sage* case or (2) under orders of a superior officer as in the present case, in either event he must get from the trial court the certificate referred to in Section 989 of the Revised Statutes in order to free himself from personal liability and to make the judgment payable by the United States. The issuance of this certificate is not certain even where the collector acted under the direction of a superior officer.[4]

In either event under whichever clause the certificate is issued and however certain the collector is that the certificate will be issued, the issuance of the certificate does not make the United States a party to the suit. While action under the direction of a superior did not appear in the record in the *Sage* case, it is not shown that it did not exist. It does clearly appear from the record in the *Bankers Coal* case (18 B. T. A. 901, 907). Action under the direction of the Commissioner also appeared from the record in the *Smietanka* case, supra.[5]

What the Government is really trying to do under the attempted distinction between the two clauses in Section

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[4] In *Toledo Edison Co. v. McMaken*, 103 F. (2d) 72 (C. C. A. 6th, 1939), cert. den. sub. nom. *Toledo Rwy. and Light Co. v. McMaken*, 308 U. S. 569, a certificate was refused even though the collector collected under the direction of his superior.

[5] The same fact probably appears in the records in most, if not all, of the cases following the *Sage* case.

989, which clearly permit of no such distinction, is to revive the same argument which it made in the *Sage* case, namely, that the suit against a collector is really a suit against the United States, since the suit is defended by the Department of Justice and judgment is expected to be paid out of the Treasury. The argument was rejected in the *Sage* case and must be rejected here.

The Government is misfaken when it says that a suit against the collector is the same thing as a suit against the United States. There are a number of practical differences which Congress, in spite of the various statutes which have been passed dealing with the remedies of taxpayers, has not seen fit to disturb. For example, either party is entitled to a jury in a collector suit but not in a suit against the United States. Costs are recoverable in suits against collectors but not in suits against the United States. Apparently a claim against a collector may be assigned,[5a] but not a claim against the United States. And more important than any of the foregoing—a suit against a collector, being personal, is protected by the Fifth Amendment and, unless a fair remedy is substituted, cannot be abolished under claim of sovereign immunity, as can a suit against the United States.[5b]

III. The *Sage* Case Should Not Be Overruled; If Any Procedural Change in Collector Suits Is Desirable It Should Be Accomplished by Legislation.

Aside from its unsuccessful attempts to distinguish the *Sage* case, the Government makes only one argument, and that is that the taxpayer should not be permitted to sue twice on the same cause of action. The Government made

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[5a] See *Masonic Country Club v. Holden*, 12 F. (2d) 951 (W. D. Mich.). "Claims against the United States are not assignable, U. S. C. A., Title 31, Sec. 203.

[5b] See our Brief in Opposition, pp. 11-13, and footnotes 8 and 9.

this same argument in the *Sage* case and it was there rejected. The very same quotation from *Stark v. Starr*, 94 U. S. 477, 485, quoted and relied upon by the Government near the beginning of its brief in the present case, was quoted and relied upon by the Government near the beginning of its brief in the *Sage* case. The Government's argument is no stronger now than it was when the *Sage* case was decided, and there are now 23 years of unanimous decisions of this Court rejecting it.

This Court has followed and approved the *Sage* case unanimously since it was decided, and Congress has not considered it necessary to change the rule there laid down, although it has made other changes in the law as to tax refund suits during these 23 years, and the Government instead of securing a change by Congress has itself relied frequently upon the *Sage* case. In a majority of the cases in this Court cited at page 5, supra, it was the Government and not the taxpayer who cited and relied upon the *Sage* case.[6] This was true also in *Hammond-Knowlton v. United States*, 121 F. (2d) 192 (C. C. A. 2nd, 1941), cert. den. December 22, 1941, No. 327, October Term 1941.

The Government, in the face of this line of unanimous decisions of this Court, concurred in by the Government for more than 20 years, seeks a decision in this case utterly at odds with those decisions. Yet in its brief it makes no forthright request that the *Sage* case or any of

[6] Not until the *Kales* case and the case at bar had the Government questioned in this Court the *procedural* implications of the *Sage* case. Even in cases where the Government has sought to avoid the *constitutional*, as distinguished from the *merely procedural*, implications of the *Sage* case, and has contended that retroactive restrictions on refund actions were justified on the basis of sovereign immunity to suit, even in suits against collectors, it has admitted the scope and authority of the decision in the *Sage* case and related cases in relation to procedure and *res judicata*. See quotations from Government briefs in *Graham v. Goodcell*, 282 U. S. 409, and *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, in our Brief in Opposition, p. 5, footnote 3.

the cases following it be overruled. Such a request, frankly made, would bring into sharp relief the obvious unfairness of overruling unanimous and long standing decisions of this Court, where the result would be to cut off completely presently existing remedies for the recovery of admitted overpayments of tax.

And yet clearly what the Government is seeking is to have the Court overrule the *Sage* case; and in support of its claim, it invokes simply the general rule of public policy against splitting causes of action which was urged unsuccessfully in the *Sage* case. There is no reason why this Court should reach a different conclusion if the question were new. However, let it be conceded for the sake of argument, that if the matter arose now for the first time, the *Sage* case would be decided differently. But the question is not now presented as an original proposition. Unanimous decisions of this Court extending over a period of nearly 23 years have made it clear that a taxpayer can present separate items of its claim for a single year in two actions if he first sued the collector. Any taxpayer was entitled to believe that it was safe in planning its course upon that basis. In such a situation another rule of public policy, the rule of *stare decisis*, applies with much greater force than does the rule against splitting of causes of action, and should certainly be sufficient to prevent this Court from retroactively cutting off presently existing remedies to enforce clear rights to recover taxes admittedly overpaid.

While reasonable repose is desirable and justifies statutes of limitations, estoppel by judgment, res judicata, prescription and the like, it is most important that no such restrictions be retroactively imposed. It is significant that practically all statutes dealing with such matters as limitations, res judicata, jurisdiction of courts, and other such matters are prospective in operation, or contain saving clauses to protect, against destruction of all remedies,

those who had been entitled to rely upon the existing system. The rule of *stare decisis* restrains the Court from accomplishing similar injustices by judicial decisions overruling previous authorities, and gives generally that stability in the law which comes from the knowledge that a question once carefully considered and decided by the court of final resort may usually be considered settled.

We, of course, do not contend that the rule of stare decisis is to be followed blindly. Where real injustice results from an erroneous decision, which clearly outweighs the injustices that may result from correcting the decision, the rule of stare decisis is not to be made an insuperable obstacle to justice and progress. But if the doctrine is to be overridden in any situation, where the authorities are clear and unanimous as they are here, at least two conditions should concur: (1) It should be clear that the established decisions are wrong, and (2) there should be a definite showing that real injustice will result from adhering to the previously settled decisions. Where such showings cannot be made, long settled decisions of this Court should certainly be followed.

It is not clear that the *Sage* case and the cases following it were wrongly decided; and there is no showing whatever that the rule of the *Sage* case has led to confusion or creates any uncertainty or has resulted in oppressive consequences, or that a continuance of the rule until, if ever, Congress sees fit to modify it prospectively will result in any injustice to the Government or taxpayers.

It would be just as unfair in this case for this Court or Congress to take away the present existing right of this taxpayer, or any other taxpayer similarly situated, to recover sums which were illegally collected from it and which it is now clearly entitled under unanimous decisions of this Court to recover, as it would be to abolish the right of a taxpayer to sue in the Court of Claims, after the statute of limitations had run against other remedies previously open

to it. It would be like reducing the limitation period on existing causes of action without allowing a reasonable time for suit. Cf. *McGahey v. Virginia*, 135 U. S. 662.

Frankly, it is thought by some that the whole scheme for suits against collectors is an out-moded form of procedure and that Congress should revise or abolish it.[7] On the other hand, the American Bar Association has gone on record as favoring the retention of the existing right to sue the collector.[8] But whichever of these views prevails, all should certainly agree that if any change should be made Congress is in a better position than this Court to make the change. In the first place, Congress can consider and act upon the subject of collector suits as a whole, whereas this Court can act only on such isolated aspects of the subject as happen to come before it in specific cases, which might easily result in great confusion on the whole subject of collector suits.[9] In the next place Congress can make its action prospective in operation with the result that

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[7] See Report of the Sub-Committee of the Committee on Ways & Means, "The Prevention of Tax Avoidance", 73rd Cong., 2nd Sess., p. 23.

[8] Reports of the American Bar Association, Vol. 65, p. 369.

[9] If this Court were otherwise inclined to overrule the Sage case it should be restrained by a consideration of the confusion likely to ensue. The collector's suit as a form of procedure in tax cases is well established and widely used and its various incidents are well understood. One of the main foundations in the structure of judicial decisions upon which the collector procedure and its consequences are based is the Sage decision. If this foundation stone is removed, what happens to all the other decisions which depend in greater or less degree upon it? What happens to the right of jury trial? Does the taxpayer lose the vitally important protection which the decision in *Graham v. Goodcell* affords against abuse of the doctrine of sovereign immunity? Was the case of *Hammond-Knowlton v. United States*, supra, wrongly decided? We assume that the *Bankers Coal Co.* decision would fall, with the result that taxpayers and the Government would find themselves bound on principles of res judicata as to issues litigated in other years in collectors' suits when at the time of trial the Government and the taxpayer were relying upon clear decisions of this Court that the issues there determined would *not* be binding in other years.

persons, who have shaped their course upon the assumption that they could rely upon the rules laid down by this Court over a period of nearly a quarter of a century, will not be barred by a retroactive change in the rules.

If the situation were one in which Congress were not perfectly free to act, the result might be different, but it is clear that Congress is free to act and that any changes which are to be made in the collector suit as a form of procedure in tax cases can much more fairly and better be made by Congress than by this Court, as was clearly recognized in *United States v. Kales*, where Chief Justice Stone said:

> "The right to pursue the common law action against the collector is too deeply imbedded in the statutes and judicial decisions of the United States to admit of so radical a departure from its traditional use and *consequences* as the Government now urges, without further Congressional action." (Emphasis supplied).

CONCLUSION.

This case is squarely covered by the *Sage* decision; the Government's attempts to distinguish the *Sage* decision are unsuccessful; the Government has advanced no satisfactory reason why this Court should overrule the *Sage* decision; and if any changes need to be made in the collector suit as a form of procedure, such changes should be made by the Congress and not by this Court. The judgment of the court below should accordingly be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 990.

THE UNITED STATES, *Petitioner*,

v.

NUNNALLY INVESTMENT COMPANY.

On Writ of Certiorari to the Court of Claims.

MEMORANDUM FOR RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MEMORANDUM FOR RESPONDENT.

Since the brief for respondent was printed, we have learned that the Treasury Department has suggested to the Committee on Ways and Means that suits against collectors be abolished, and that the Board of Tax Appeals be given jurisdiction along with District Courts and the Court of Claims. The following is from the testimony of Mr. Randolph Paul, speaking for the Treasury Department:[1]

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[1] Unrevised Print, Hearings before the Committee on Ways and Means, House of Representatives, 77th Congress, 2nd Session, Revenue Revision of 1942—pp. 94-95.

The necessary number of copies of these hearings could not be obtained. For that reason we have printed the material portions of Mr. Paul's testimony in this memorandum. Since it was necessary to print the testimony, we have taken the libery of adding some brief comments.

"Procedural provisions: At this point I should like to mention two important procedural changes which we are suggesting.

"Suits against collectors of internal revenue: At the present time the legal avenues available to a taxpayer desiring to sue for a tax refund present alternatives which serve only to create confusion and unnecessary litigation. A taxpayer may in some instances either sue the United States in a district court or the Court of Claims, or sue a collection of internal revenue in a district court. The action against the collector has been fittingly described by the Supreme Court as an 'anomalous relic of bygone modes of thought.' This antiquated procedure has no present justification, for the alternative procedures afford adequate remedies. The right to sue the collector tends to prolong tax controversies, since a taxpayer may first sue the collector and then, if he is defeated, sue the United States all over again on what is in effect the same cause of action. It is suggested that this situation be remedied by the elimination of suits against the collector.

"Refund jurisdiction on Board of Tax Appeals: The jurisdiction of the Board of Tax Appeals is limited to proceedings arising under a deficiency letter issued by the Commissioner. While the Board has authority to find an overpayment in certain cases, it does not possess any general authority to hear refund claims. The Board is a tribunal specially skilled in tax matters and there is no sound reason for denying to taxpayers the opportunity to present their refund claims to such a forum. As the great bulk of tax cases are at present tried before the Board of Tax Appeals, the addition of refund jurisdiction will not unduly burden the Board. It is therefore suggested that an appropriate procedure be devised under which the Board may hear refund cases if the taxpayer desires to utilize that forum instead of the district courts or the Court of Claims."

It will be observed that Mr. Paul in his testimony *frankly admits that under existing law a taxpayer may first sue the collector and then sue the United States* over again on what he says is, in effect, the same cause of action. This is sug-

gested as one of the reasons for the request that suits against collectors be abolished.

It has been our contention throughout that if any change is to be made in the "traditional use or consequences" of suits against collectors, as is proposed by the Government in this case, the change should be made by Congress and not by this Court. And we suggested in the brief in opposition to certiorari that, if Congress should see fit to act, "just what changes Congress would adopt are entirely problematical."

If the right of jury trial is preserved, if costs are made recoverable against the United States, and if some assurance can be given that Congress will not later seek to destroy vested rights of action under claim of sovereign immunity, there would seem to be no sound objection to the adoption of the Treasury proposal. Legislation of this character would create no confusion and would have none of the unfair retroactive effect which would result from a reversal by this Court of its previous decisions dealing with the nature and consequences of suits against collectors. There is, of course, no question as to the constitutional power of Congress to deal with the situation. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

Respectfully submitted,

W. A. SUTHERLAND,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 990.—October Term, 1940.

The United States, Petitioner, vs. Nunnally Investment Company. } On Writ of Certiorari to the Court of Claims.

[May 11, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is a suit against the United States to recover taxes for the year 1920. In that year the taxpayer, the respondent here, sold its business and all its assets to another corporation. The consideration consisted of cash and the assumption of certain of the respondent's obligations, including federal taxes for previous years. The purchaser paid part of these taxes in 1920, the remainder in 1921 and 1922. In determining a deficiency for the year 1920, the Commissioner employed a lower basis of the assets sold than was used by the respondent. The Commissioner computed the selling price by including the full amount of the taxes which the purchaser agreed to assume. After paying the assessed tax, the respondent filed a claim for refund, alleging only that the Commissioner had understated the basis of the assets sold. In due course a suit was brought against the Collector in the District Court. A settlement was reached under which judgment for the taxpayer was entered. In accordance with their agreement, neither party appealed.

Thereafter, the respondent filed a second refund claim, asserting that the taxes assumed by the purchaser which were not paid in 1920 were not taxable to the respondent in that year. This claim was rejected, and a suit against the United States was begun in the Court of Claims. Holding that the judgment against the Collector in the District Court was not res judicata of the taxpayer's claim in this suit against the United States, the Court of Claims (with one judge dissenting) gave judgment for the respondent. 36 F. Supp. 332. In view of the importance of this question in the administration of the federal income tax law and its relation to the decision in *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, we brought the case here. 314 U. S. —.

Nearly a quarter-century ago in *Sage* v. *United States*, 250 U. S. 33, this Court upon full consideration announced the doctrine that the United States is a "stranger" to a judgment resulting from a suit brought against a collector, and that such a judgment is, therefore, not a bar in a subsequent action upon the same claim against the United States. This was not a novel doctrine. The result was drawn from the conception of a suit against a collector as "personal", since he was personally responsible for illegally exacting monies under the claim that they were due as taxes. Such a "personal" remedy against the collector, derived from the common-law action of *indebitatus assumpsit*, has always been part of our fiscal administration. Unless the application given to this remedy by the doctrine of the *Sage* case has been displaced by Congress or renounced by later decisions of this Court, the judgment must stand. Concededly Congress has not done so. And although recognition has been made of the technical nature of a suit against a collector, no support can be found for the contention that the *Sage* doctrine has been discarded as an anachronism. On the contrary, the rule has been reaffirmed in an unbroken line of authority.

Soon after the decision in the *Sage* case, the question was presented whether an action against a collector could be continued against his successor. This Court held that it could not, because the *Sage* case had settled that such a suit was "personal". See *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Union Trust Co.* v. *Wardell*, 258 U. S. 537. In *Bankers Coal Co.* v. *Burnet*, 287 U. S. 308, a suit against a collector with respect to taxes for the years 1914-1919 had resulted in a determination that the taxpayer was entitled to a depletion allowance of five cents per ton on coal mine royalties. It was contended that this determination was res judicata of that issue in a subsequent action against the Commissioner relating to taxes for later years. The Court, again relying on the *Sage* case, rejected the argument in these words: "With respect to this contention it is sufficient to say that the suit in the District Court was not against the Commissioner of Internal Revenue, the respondent here, but against the Collector, judgment against whom is not *res adjudicata* against the Commissioner or the United States." 287 U. S. at 312.

The Government leans heavily upon *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373. In that case the constitutionality of § 1014 of the Revenue Act of 1924, 43 Stat. 253, 343, providing that a taxpayer may recover an unlawful federal tax even though he paid the tax without protest, was upheld as applied to a payment without protest made prior to the enactment of the provision. In reaching this conclusion, the Court noted that under R. S. §989, 28 U. S. C. §842, a collector who acts under the directions of the Secretary of the Treasury, or other proper officer of the Government, "is entitled as of right to a certificate converting the suit against him into one against the Government . . . A suit against a Collector who has collected a tax in the fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. . . . . There may have been utility in such procedural devices in days when the Government was not suable as freely as now. . . . . They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court." 289 U. S. at 381-83.

The Government urges that even though the *Moore Ice Cream* case was not concerned with the conclusiveness of a judgment in a suit against the collector, its rationale undermined the *Sage* doctrie. But such has not been the influence of the *Moore Ice Cream* case on the subsequent course of decisions relevant to our purpose. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, decided by a unanimous Court three weeks after the decision in the *Moore Ice Cream* case, is incontrovertible proof that the *Sage* doctrine was left unimpaired. The Court there held that a judgment in a suit against the Commissioner was binding in a subsequent action against the United States and the collector. The doctrine in the *Sage* case was explicitly reaffirmed: "In a suit for unlawful exaction the liability of a collector is not official but personal. *Sage* v. *United States*, 250 U. S. 33; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430.

And for this reason a judgment in a suit in which he was a party does not conclude the Commissioner or the United States. *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, 311. We think, however, that where a question has been adjudged as between a taxpayer and the Government or its official agent, the Commissioner, the Collector, being an official inferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment." 298 U. S. at 627.

More recently, in *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, where the principle of res judicata was applied to suits to which an administrative agency was a party, the Court again expressly adhered to the doctrine of the *Sage* case: "Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (*Sage* v. *United States*, 250 U. S. 33; *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308) are not in point, since the suit against the collector is 'personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different.'" 310 U. S. at 403. And earlier in this term in *United States* v. *Kales*, 314 U. S. 186, in speaking of the right of a taxpayer to maintain separate suits against a collector and the government for tax payments made to two collectors on income derived from a single transaction in a single tax year, the Court said: "The judgment against the collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. See *Sage* v. *United States*, *supra*; *Smietanka* v. *Indiana Steel Co.*, *supra*, 4, 5. While the statutes have for most practical purposes reduced the personal liability of the collector to a fiction, the course of the legislation indicates clearly enough that it is a fiction intended to be acted upon to the extent that the right to maintain the suit and its incidents, until judgment rendered, are to be left undisturbed. . . . The right to pursue the common law action against the collector is too deeply imbedded in the statutes and judicial decisions of the United States to admit of so radical a departure from its traditional use and consequences as the Government now urges, without further Congressional action." 314 U. S. at 199-200.

In summary, therefore, an imposing series of opinions has fortified the original authority of the *Sage* doctrine. No doubt the

precise question raised in each of these cases was different from the one now before us, and each case might have been decided without reference to the principles underlying the rule in the *Sage* case. But this only serves to emphasize the obduracy of the doctrine as part of the historical scheme of revenue administration. It would have been easy in all of these cases to dissipate the force of the doctrine which the *Sage* case represents by rejecting it and resting the decision in that case upon the alternative ground afforded by the Act of July 27, 1912, c. 256, 37 Stat. 240. That this long line of cases should have referred to and relied upon the *Sage* case without rejecting the doctrine for which it was cited only underlines still further its persistence.

Even when this Court found that the common-law right to sue the collector had argumentatively been withdrawn, see *Cary* v. *Curtis*, 3 How. 236, Congress promptly restored that right. Act of February 26, 1845, c. 22, 5 Stat. 727. The problem of legal remedies appropriate for fiscal administration rests within easy Congressional control. Congress can deal with the matter comprehensively, unembarrassed by the limitations of a litigation involving only one phase of a complex problem. The Government itself does not now ask us to jettison the whole notion of suing a collector personally. It merely asks us to eliminate one consequence of that conception. In the field of custom duties Congress has devised a comprehensive and interrelated scheme of administrative and judicial remedies. See Act of June 17, 1930, 46 Stat. 590, 734, 19 U. S. C. §§ 1514-15; Freund, Administrative Powers over Persons and Property, pp. 553-60. If the doctrine of the *Sage* case is now to be abandoned, such a determination of policy in the administration of the income tax law should be made by Congress, which maintains a Joint Committee on Internal Revenue Taxation charged with the duty of investigating the operation of the federal revenue laws and recommending such legislation as may be deemed desirable.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 990.—October Term, 1940.

The United States, Petitioner, *vs.* Nunnally Investment Company } On Writ of Certiorari to the Court of Claims.

[May 11, 1942.]

Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Byrnes dissent for the reasons (1) that here, unlike the situation in *United States* v. *Kales*, 314 U. S. 186, the taxpayer had but a single cause of action and could have raised every issue with respect to the validity of the taxes in the earlier suit; (2) that here, unlike the situation in *Sage* v. *United States*, 250 U. S. 33, 38-39, there had been no intervening legislation which created rights and lifted the bar of the judgment in the earlier suit; and (3) that in the earlier suit the United States became "a party to the judgment as a matter of law" (Griswold, Res Judicata in Federal Tax Cases, 46 Yale L. Journ. 1320, 1342) since in these days the presence of the collector as a defendant who acts "in the line of duty" is "merely a remedial expedient for bringing the Government into court." *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 383.